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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18728, 18729 and 18731

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, STATE OF WASHINGTON, DEPARTMENT OF CONSERVATION, UNITED STATES OF AMERICA EX REL. STEWART L. UDALL, Secretary of the Interior, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Petition for Review of an Order of the Federal Power Commission

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JOINT APPENDIX

VOLUME II

27372

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., and Harold C. Woodward.

PACIFIC NORTHWEST POWER COMPANY — Project No. 2243

WASHINGTON PUBLIC POWER SUPPLY SYSTEM — Project No. 2273

Order Reopening the Record

(Issued July 6, 1962)

By letter of June 28, 1962, the Secretary of the Interior set forth his present position regarding the applications of Pacific Northwest Power Company and Washington Public Power Supply System in Project No. 2243 and Project No. 2273, respectively. Since the record which was closed September 12, 1961 contains letters setting forth his prior position on these applications, it is appropriate that the record be reopened to include the Secretary of the Interior's letter of June 28, 1962 solely as the current statement of his position.

We also believe that the parties should have an opportunity to comment upon the Secretary's new statement of position and that the Examiner should consider the proceeding in the light of the changed circumstances. Accordingly, we shall provide that all parties to the proceeding will have 20 days from the issuance of this order within which to file such supplemental briefs as they may believe warranted in the light of the inclusion of the Secretary's letter in the record, and that the Examiner's Initial Decision give appropriate consideration to the record as supplemented and any additional arguments of the parties.

The Commission orders:

(A) The record in the above-entitled proceeding is reopened to include the letter of the Secretary of the Interior dated June 28, 1962 as a statement of his position, and for no other purpose.

(B) Withing 20 days from the date of issuance of this order the parties may file supplemental briefs with respect to the Secretary's letter of June 28, 1962 designated Exhibit No. 43-A in these proceedings.

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(C) In his initial decision, the Presiding Examiner shall give consideration to the statement of position expressed by the Secretary of the Interior in Exhibit No. 43-A and to any supplemental briefs with respect thereto that may be filed by any of the parties.

By the Commission.

(SEAL)

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

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Decision

PACIFIC NORTHWEST POWER COMPANY — Project No. 2243

WASHINGTON PUBLIC POWER SUPPLY SYSTEM — Project No. 2273

Upon Competing Applications for a License Under Section 4(e) of the Federal Power Act

(Issued October 8, 1962)

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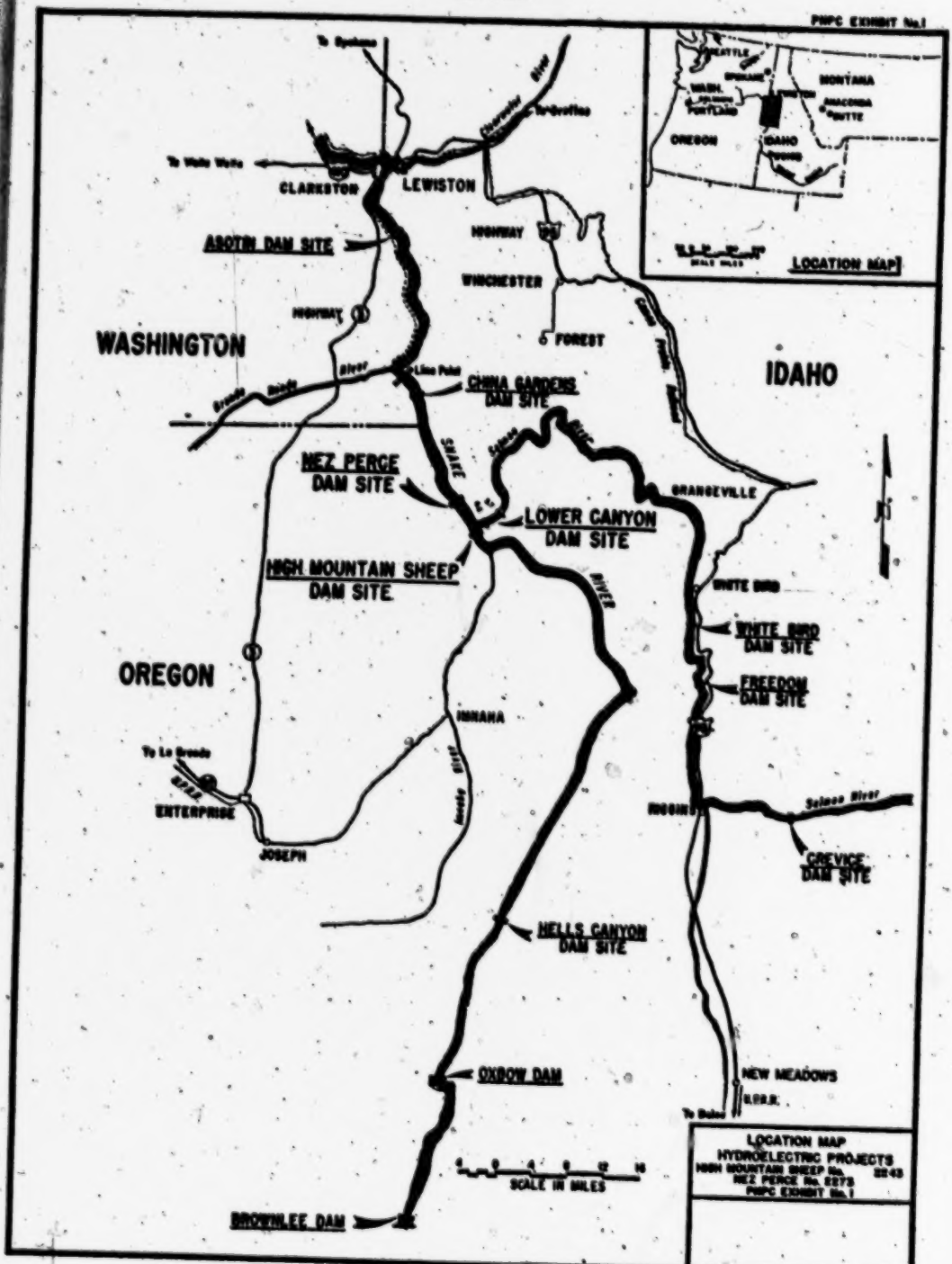
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PRELIMINARY STATEMENT AND CONCLUSIONS

LEVY, PRESIDING EXAMINER: This proceeding involves rival applicants for licenses to build mutually exclusive hydroelectric projects at sites[1] just above (High Mountain Sheep) and below (Nez Perce) the confluence of the Snake and Salmon Rivers on the Idaho-Oregon border.

It is concluded, in summary, for all the reasons hereinafter set forth, that Pacific Northwest Power Company should be licensed to construct the High Mountain Sheep project. The High Mountain Sheep plan emerges from this record as the comprehensive plan of development for the common reach which provides for prompt and optimum multi-purpose development of the water resource under the standards of Section 10(a) of the Federal Power Act. Its major component, the High Mountain Sheep project, is best adapted to achieve such development.

In the prior proceeding on the proposed Low Mountain Sheep and Pleasant Valley developments (Project 2173) the Commission concluded "that any combination of projects for the comprehensive development of the Mountain Sheep river basin which includes Nez Perce project is consistently superior to any combination of projects which does not include Nez Perce project." (Opinion and Order on rehearing issued April 11, 1958). That conclusion was reached in a different proceeding involving

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a different application and record. Moreover, no one was then applying for a license to build the Nez Perce project;

[1] See Location Map, PNPC Exh. 1. (Citations to the record are illustrative and for the purpose of aiding the Commission in any review. They are not intended to indicate the sole basis in the record for the statement or findings).

no specific Nez Perce application was pending. Consequently, the Commission's earlier statement of view is not *res judicata* in this subsequent comparative proceeding.[2] Administrative license proceedings look forward, not backward, and licensing policy must change with new facts and changing conditions. Pacific Northwest Power Company's investigations and studies since 1958, in support of its current High Mountain Sheep application, insofar as they are part of the record in this proceeding, demonstrate that the power potential of the High Mountain Sheep plan would have a greater value initially than the Nez Perce plan of $3,973,000 annually.[3] At approximately 1985 the High Mountain Sheep plan benefits would have a monetary value exceeding the Nez Perce plan benefits of $2,640,000 annually (High Mountain Sheep plan $49,644,000—Nez Perce plan $47,004,000). The High Mountain Sheep plan of development, fully installed, will have, at all times and under all conditions, greater annual power benefits and greater annual flood control benefits than the Nez Perce plan of development.

These additional benefits will involve greater capital costs ranging from $11,040,000 to $49,616,000, according to Staff estimates (See Appendix C). These costs are justified, however, by the greater power and flood control benefits of the High Mountain Sheep plan, and by its greater feasibility and flexibility. The High Mountain Sheep project, its major component, can be built safely now, without delay, without risk to the major fishery resource of the

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[2] "A Commission like a court, may, indeed should, change its finding and order if on rehearing it is of a different mind. *Cia Mexicana De Gas S. A.* v. *F.P.C.*, 167 F. 2d 804, 806 (C.C.A. 5, 1948). See *Panhandle Eastern Pipeline Co.* v. *F.P.C.*, 236 F. 2d 289, 292 (3rd Cir. 1956). See also *F.T.C.* v. *Raladam Co.*, 316 U.S. 149 (1942).

[3] High Mountain Sheep plan $57,436,000—Nez Perce plan $53,463,000. See Applicants' Joint Statement, Part J, Annual Power Benefits.

Salmons River, and without adding substantially to the existing problem of maintaining the run of the main Snake River. There is substantial doubt in the record as to whether the left abutment at the Nez Perce site will safely support the thrust of the proposed Washington Public Power Supply System arch dam; or whether the underground powerhouses and orifice spillway can be constructed as presently designed within WPPSS' current estimate (391,080,000). Moreover, the Nez Perce project cannot be built now without constituting a major hazard to migrating fish, particularly the spring and summer chinook and steelhead in the Salmon River. The Lower Canyon project, which would also constitute a major hazard to migrating fish, can be deferred until after the completion and evaluation of current Department of Interior fish studies, further site exploration, and until its construction is required under the standards of the Federal Power Act.

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Pacific Northwest Power Company, rather than WPPSS, is entitled to a license to build High Mountain Sheep because its timely efforts, expenditures, and investigations have produced the comprehensive plan and the project best adapted to that plan. These expenditures were made pursuant to a preliminary permit issued by the Commission on April 8, 1955, for this purpose, and its reasonable expectations should not be thwarted absent strong public policy considerations not present in this record. PNPC's organizing companies have executed firm commitments to purchase the entire output of the project and will need the power as of the earliest date that the High Mountain Sheep project can be expected to be in service. PNPC has demonstrated a need and a market for the output as well as its ability to finance the construction of the project.

WPPSS has failed to establish a need or a market for the output of either Nez Perce or High Mountain Sheep, or

that it has the ability now to finance the construction of any project that might be licensed to it in this proceeding. WPPSS' market is based on the anticipated general demand for electric energy in the Pacific Northwest, principally from PNPC's sponsor companies, not on any contractual commitments entered into by specific customers. The record in this proceeding does not indicate that it has complied, or attempted to comply, with state laws concerning its right to construct the proposed projects within the States of Oregon and Idaho, or to carry on a public utility business in those states. Moreover, Section 7(a) of the Federal Power Act does not require the Commission to grant WPPSS' motion to amend its Nez Perce application so as to authorize a license for High Mountain Sheep, nor should it do so.

The public benefits, and comprehensive development which will be achieved by the construction of the High Mountain Sheep project can be effectuated now, with the issuance of a license for non-Federal development. If Federal development is recommended, as requested by the Secretary of the Interior, it will probably result in the postponement of any development of this site for an indefinite period of time.

On March 31, 1958, PNPC filed an application for the High Mountain Sheep development, Project No. 2243, at about river mile 188.9, to be located on the Snake River above the mouth of the Salmon River.[4] On April 8, 1955, PNPC was granted a preliminary permit effective April 1, 1955, for a period of three years for Project No. 2173, consisting of two developments on the Middle Snake, namely, Mountain Sheep development at approximately river mile 192.8, and Pleasant Valley development at approximately

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[4] A chronological list of written pleadings, filings, orders and rulings from March 31, 1958 to date is set forth in Appendix A.

river mile 212.8 (14 F.P.C. 644), and on September 7, 1955, PNPC filed a license application covering the same reach of the river for a proposed hydroelectric project (Project No. 2173) known as the Mountain Sheep-Pleasant Valley Hydroelectric Project. Following some 54 days of hearing in 1956, an initial decision recommending licensing was issued by

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the Presiding Examiner on July 23, 1957. The application was denied by the Commission in a decision dated January 20, 1958 (19 F.P.C. 127); and an application for rehearing denied on March 20, 1958 (19 F.P.C. 353).

On March 15, 1960, WPPSS filed an application for a license for the Nez Perce Project No. 2273, a mutually exclusive project, located just below the mouth of the Salmon River in the same stretch of the Snake River at about river mile 186. Hearing on PNPC's application was originally fixed for March 21, 1960, by order of the Commission dated February 1, 1960. Following the filing of WPPSS' application for Nez Perce on March 15, 1960, proceedings on the two competing applications were consolidated by Commission order of March 30, 1960, and the consolidated hearing was postponed to July 18, 1960. Notice of both applications was duly published on October 26, 1959 (PNPC) and March 23, 1960 (WPPSS).

PNPC is an Oregon corporation qualified to do business under the laws of the States of Oregon, Idaho, Washington, and Montana. It is a wholly owned subsidiary of four sponsoring companies,[5] the Montana Power Company, Pacific Power and Light Company, Portland General Electric Company, and the Washington Water Power Company,

[5] A detailed description of these companies is contained in the Presiding Examiner's initial decision, Project No. 2173, p. 12 *et seq.*

and was formed in April of 1954 for the purpose of providing a supplemental source of power to meet the future requirements of these companies (Tr. 144-147, 1777-1779). PNPC does not itself own or operate any electrical facilities.

WPPSS was created, as a Joint Operating Agency, composed of 16 public utility districts of the State of Washington, pursuant to an order of the Department of Conservation and Development of the State of Washington dated January 31, 1957, and, under the laws of the State of Washington, is a municipal corporation. It was established for the purpose of acquiring, constructing, and operating electrical generating and transmission facilities (WPPSS Exh. 1, Tr. 406, 418-421). WPPSS does not own or operate any electric facilities.

Intervening Parties[6]

Pursuant to Section 1.8(a)(1) of the Commission's Rules of Practice and Procedure the PUBLIC UTILITY COMMISSIONER OF OREGON and the IDAHO PUBLIC UTILITIES COMMISSION gave notice of their intervention on

December 1, 1959 and December 3, 1959, respectively, in Project No. 2243. The IDAHO PUBLIC UTILITIES COMMISSION gave further notice of intervention in Project No. 2273 on April 18, 1960.

Other parties were granted intervention by the Commission's Orders of May 20, July 13, August 16 and September 16, 1960, respectively. These parties are listed below:

[6] The Examiner is indebted to the Applicants and Staff for a joint stipulation covering "Introductory Material," "Joint Exhibit," "Applicants' Joint Statement," and Appendix to "Introductory Material," all of which are adopted by the Examiner and made a part of the record.

Project No. 2243

NATIONAL HELLS CANYON ASSOCIATION and
NORTHWEST PUBLIC POWER ASSOCIATION[7]
IDAHO FISH AND GAME COMMISSION and
IDAHO FISH AND GAME DEPARTMENT
COLUMBIA RIVER SALMON & TUNA PACKERS ASSOCIATION
STATE WATER RESOURCES BOARD OF THE STATE OF OREGON
OREGON STATE GAME COMMISSION and
FISH COMMISSION OF THE STATE OF OREGON
DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON
and DEPARTMENT OF GAME OF THE STATE OF
WASHINGTON
WASHINGTON PUBLIC POWER SUPPLY SYSTEM
DEPARTMENT OF CONSERVATION OF THE STATE OF
WASHINGTON
OREGON STATE GRANGE and WASHINGTON STATE GRANGE

Project No. 2273

OREGON STATE GAME COMMISSION and
FISH COMMISSION OF THE STATE OF OREGON
COLUMBIA RIVER SALMON & TUNA PACKERS ASSOCIATION
FISHERMEN'S COOPERATIVE ASSOCIATION, INC.
PACIFIC NORTHWEST POWER COMPANY
DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON
DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
NORTHWEST FISHERIES ASSOCIATION
MAKAH INDIAN TRIBE
WASHINGTON STATE SPORTSMEN'S COUNCIL, INC.
OREGON WILDLIFE FEDERATION

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[7] On the basis of a motion by these associations dated October 3, 1960 stating that their interests regarding both Project No. 2243 and No. 2273 would be adequately represented by WPPSS, the Commission, by Order of October 17, 1960, granted their request to have the Orders of March 3 and August 16, 1960 granting intervention vacated.

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IDAHO WILD LIFE FEDERATION
ASSOCIATION OF PACIFIC FISHERIES and
PUGET SOUND SALMON CANNERS, INC.
IDAHO FISH AND GAME COMMISSION
PACIFIC FISH CONSERVATION LEAGUE, INC.
ALASKA FISHERMEN'S UNION
STATE WATER RESOURCES BOARD OF THE STATE OF OREGON
DEPARTMENT OF FISH AND GAME OF THE STATE OF ALASKA
CHINOOK AND COWLITZ INDIAN NATIONS
NATIONAL HELLS CANYON ASSOCIATION and
NORTHWEST PUBLIC POWER ASSOCIATION
CONFEDERATED BANDS AND TRIBES OF THE
YAKIMA INDIAN NATION
DEPARTMENT OF CONSERVATION OF THE
STATE OF WASHINGTON
OREGON STATE GRANGE and
WASHINGTON STATE GRANGE

Prehearing Conferences and Hearing

Pursuant to Section 1.18 of the Commission's Rules of Practice and Procedure, prehearing conferences were held on May 16 and 17, June 15, and October 31, 1960, respectively. The results of these conferences are set forth in prehearing transcript No. 1, (Tr. 100-111) in 23 prehearing conference exhibits, and in the Presiding Examiner's Notice of September 28, 1960, covering procedural matters.

The hearing convened in Washington, D. C. on November 4, 1960, and was concluded on September 12, 1961,[8] There

[8] The hearing originally concluded on July 24, 1961, but was reopened on July 26 to comply with the Commission's Order of July 25, 1961, setting aside the Presiding Examiner's ruling that certain WPPSS proposed rebuttal testimony be excluded. This evidence was received in the record on September 12, 1961, at which time cross-examination was waived, and the hearing concluded.

were approximately 97 days of hearing, including a 15-day session at Portland Oregon, in March 1961, for hearing on the fisheries' phase during which period the Examiner inspected the sites accompanied by representatives of the Staff and Applicants. In all, some 77 witnesses testified, 14,327 pages of transcript and 633 documentary exhibits (many of them consisting of voluminous charts designs and statistics) were received in evidence. Initial briefs were

filed by the Applicants on January 15, 1962, and by Staff and Interveners[9] on March 1, 1962. Reply briefs were filed by the Applicants on April A, 1962. Supplemental briefs, in response to the Commission's order of July 6, 1962, reopening the record, were filed on or about July 30, 1962.[10]

Jurisdiction

In the prior proceeding (Project No. 2173) the Commission described the Snake River as follows:

> The Snake River is the largest tributary of the Columbia River. The Columbia River Basin is described by the United States Army Corps of Engineers (House Document No. 531, 81st Congress, 2nd Session) as the largest present producer and the largest potential source of hydroelectric power on this continent, as the primary salmon-producing stream in the United States

[9] The following Interveners filed briefs: State of Washington Department of Conservation, Idaho Wild Life Federation, Fishing and Game Agencies for States of Idaho, Oregon and Washington, Washington State and Sportsmen's Council, Inc., Oregon Wildlife Federation, Fishermen's Cooperative Association, Inc., Northwest Fisheries Association, Alaska Fishermen's Union, Pacific Fish Conservation League, Makah Indian Tribe, Columbia River Salmon & Tuna Packers Association, Idaho Public Utilities Commission, Public Utilities Commission of Oregon.

[10] The briefs total approximately 2,008 pages.

and as carrying active barge navigation over 300 miles inland. (*In the Matter of Pacific Northwest Power Company,* 1958, 19 F.P.C. 127, 129)

In its decision of August 4, 1956, *In the Matter of Idaho Power Company,* [11] 14 F.P.C. 55, 72, the Commission found the Snake River, from its junction with the Columbia River up to the mouth of Henry's fork (at about river mile 868), a navigable water of the United States. This includes the reach of the Snake River involved in this proceeding. Once found navigable, the waterway remains so. (*U. S. The Appalachian Power Company,* 311 U.S. 377, 408). Consequently, under Section 23(b) of the Federal Power Act, a license is required for the construction, operation, or maintenance by either applicant of the Nez Perce or the High Mountain Sheep projects, each of which would be located in the navigable reach of the Snake River. In addition, these proposed projects would occupy lands of the United States within the Wallowa, Nez Perce and Payette National Forests.

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The term "Middle Snake River" as used in this proceeding includes the portion of the Snake River and its tributaries between Lewiston, Idaho and Weiser, Idaho. Going upstream from Lewiston, the major tributaries are the Grand Ronde, the Salmon, the Imnaha, the Powder and the Burnt Rivers. The Middle Snake Basin has extremely rough terrain and comparatively inaccessible and sparsely populated areas consisting of eroded canyons through mountainous country. A stretch of approximately 100 miles downstream from Weiser, Idaho is commonly referred to as "Hell's Canyon." The mean discharge at the Nez Perce

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[11] See *National Hells Canyon Association* v. *F.P.C.*, 237 F. 2d 277 (CADC), *cert. den.* 353 U.S. 924.

site just below the confluence of the Snake and Salmon Rivers is estimated at 30,600 cfs with the maximum and minimum mean monthly flow being indicated at 115,000 cfs in May 1928 and 9,200 cfs in September 1924. The flow at this site for the greatest known flood in 1894 is estimated at 250,000 cfs (Division Engineer's Report, Vol. I p. 364).

The Issues

The basic issues in this proceeding are which of the proposed projects is best adapted to a comprehensive plan of development for all public purposes as required by Section 10(a) of the Act; which, if any, should be licensed, and to whom should the license be issued. This in turn depends upon a wide range of engineering, geologic, economic, financial, legal, and policy considerations of varying importance, including the safety and stability of the proposed dam sites and project structures, the impact of the proposed projects on the fishery resource, comparative economic and financial feasibility, the needs and market for the power output of the proposed projects, the relative qualifications and legal status of the competing applicants, and an overall comparison of the proposed plans and projects in terms of design, costs, benefits, and other relevant factors.

An additional issue raised by the Secretary of Interior's letter of June 28, 1962 (Exh. 43-A) is whether the Commission should recommend Federal development of the High Mountain Sheep project pursuant to Section 7(b) of the Act.

Pending Motions

The following pending motions require disposition:

1. A motion filed by WPPSS on July 24, 1961, to amend its Nez Perce application to conform to the exhibits

and testimony submitted on rebuttal in support of revised Nez Perce designs and cost estimates. This proposed amendment is consistent with WPPSS' timely filed Nez Perce application. The project and site remain the same (See *City of Seattle and Pend Oreille PUD No. 1, Project No. 2144*).

The motion is granted.

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2. A motion filed by WPPSS on September 12, 1961, for leave to amend its Nez Perce application, Project No. 2243, to include a project at High Mountain Sheep, described in rebuttal exhibits and testimony, as an alternative in the event the Commission denies its Nez Perce application and decides to license a project at High Mountain Sheep.

This motion is denied. The proposed amendment is inconsistent with WPPSS' pending Nez Perce application, contrary to the Commission's Order of Consolidation of March 30, 1960, its Rules of Practice, and contrary to the public interest. A similar motion filed April 24, 1961, for leave to file an amendment to its pending Nez Perce application for a license to construct an alternative High Mountain Sheep Project was denied by the Presiding Examiner on May 2, 1961, and affirmed by the Commission by order dated May 19, 1961.[12] The Presiding Examiner's ruling reviewed the prior chronology of the hearing and found that the proposed amendment was untimely under the Commission's Order of Consolidation of March 30, 1960, and that no explanation or justification for the failure to amend prior

[12] A petition for rehearing filed June 20, 1961, was denied by the Commission on July 20, 1961. The Commission's order stated that the motion, if considered as one to amend the pleadings to conform with the evidence, would be premature and should be denied without prejudice to its renewal at the appropriate time.

to the commencement of the hearing in November 1960 had been presented.

This is all the more true of the pending motion filed on September 12, 1961, after the conclusion of the hearing. The sole justification is that the amendment is now offered to conform WPPSS' license application to the evidence, including its alternate proposal for High Mountain Sheep presented as part of its rebuttal attack on PNPC's High Mountain Sheep Project. The motion, however, seeks a WPPSS license for the rival High Mountain Sheep Project. This goes far beyond the proper scope of a motion to conform the pleadings in the Nez Perce application to the evidence.

The merits of the rival plans and projects have been an issue raised by the competing applications from the very beginning. Nez Perce and High Mountain Sheep are mutually exclusive projects; the licensing of one excludes the other. Since WPPSS is maintaining and not withdrawing

its application for Nez Perce, the motion to amend is in essence an application for a license to build any project the Commission is willing to license. If the Commission is persuaded that High Mountain Sheep should be built, PNPC, the principal proponent, rather than WPPSS, the opponent, should be licensed for the project its investigations, expenditures, and advocacy have brought to fruition. The granting of WPPSS' motion is not in the public interest and will not advance the objectives of the Federal Power Act—to promote water resource development.

At the opening of the hearing, Counsel for WPPSS explained that the decision of WPPSS to file on the Nez Perce site was not based on a desire to prevent PNPC from

getting a license for this reach of the river, but because of their belief in the superiority of the Nez Perce Project.

> We are in here to see to it that the Nez Perce Project is licensed, and we intend to take every step that is necessary to that end, including whatever procedural steps we feel in all good faith and honesty are necessary to protect our position. This is our one and only motivation and objective. (1 Tr. 38)

The managing director for WPPSS testified to the same effect:

> We recognized the need and obligation of the companies to provide a future power supply. It was with no intent to prevent them from obtaining a future power supply, but rather insurance of full development of this reach of the river that we were primarily concerned with, and the production of the added benefits in low cost power and flood control that would result. And in view of all the circumstances the existence of this legislation, the fact that hearings had been scheduled on the Mountain Sheep project, brought us to the conclusion the time had arrived for the public agencies to make application for a license on Nez Perce.
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> • • •
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> I am sure had (PNPC) • • • seen fit to make a filing on the Nez Perce project, in my opinion the public agencies wouldn't have made a filing on the Nez Perce project. (23 Tr. 4448).

The applications were consolidated for hearing and the hearing proceeded on the theory that the issue before the Commission was the respective merits of the rival plans of development—WPPSS' Nez Perce or

PNPC's High Mountain Sheep. PNPC allegedly has made total expenditures, including the prior proceeding, approaching $5,000,000; WPPSS has spent $1,250,000. If WPPSS intended applying for a license to build High Mountain Sheep as well as Nez Perce, it should have given notice thereof ". . . in less than 10 days before the date set for the commencement of the hearing . . ." (Rule 1.8(d)). No justification or extraordinary circumstances have been set forth in WPPSS' motion to explain its delay in notifying the Commission and PNPC prior to the conclusion of the hearing that it was now an applicant for the High Mountain Sheep project. Moreover, WPPSS' inferior showing, discussed elsewhere, in terms of its market needs, ability to finance, and compliances with local law all apply equally to WPPSS' ability and capacity to build High Mountain Sheep as well as Nez Perce. The argument that WPPSS' preference rights under Section 7(a) of the Act require the granting of the motion is without merit as pointed out in the discussion of WPPSS' status under Section 7(a) of the Act.

Accordingly, the motion to amend WPPSS' license application to add the High Mountain Sheep project is denied. Section 7(a) does not require this amendment and the public interest would not be served by it. On the contrary, the Commission would have great difficulty in encouraging future investigation of the nation's water resources by private non-preference utilities. Moreover, the fair and orderly conduct of comparative proceedings under rules designed to achieve procedural due process with minimum delays requires that the parties be bound by the pleadings and positions on which the hearing has been conducted and has proceeded to a conclusion. If at the end of a long and expensive hearing an applicant can adopt his rival's plan without abandoning his own, the

fairness of the procedure itself becomes suspect. This principle antedates the common law. "Drink waters out of thine own cistern, and running waters out of thine own well" (Proverbs 5:15). Rather than functioning as an aid to the Commission in promoting prompt, optimum development of our water resources and in selecting the best applicant to insure successful development, the hearing becomes a trap for the unwary. Nor does the public interest require the contrary. I am persuaded by the entire record that High Mountain Sheep, if licensed, will be built sooner by PNPC than by WPPSS, which still maintains that it is an inferior project and should not be constructed by anyone.

3. PNPC's motion filed April 11, 1962, to Strike Certain Material from WPPSS' initial brief.

This motion is denied. The material referred to is discussed in the briefs and is a part of the argumentation contained therein. The record is not expanded by references in the brief to material which is not in evidence.

4. PNPC's motion filed June 11, 1962 (as amended June 15, 1962) to Strike the Reply Brief of WPPSS on the ground that "on not less than 49 pages of the said Reply Brief there are references to factual and opinion evidence that is not in the record." (WPPSS' Answer filed June 28, 1962).

The motion is granted to the extent that the reply brief purports to discuss the results of a field investigation of the Nez Perce site conducted by two unidentified WPPSS geologists after the filing of the initial briefs in this proceeding. The results of this post-hearing field investigation are not in evidence and no petition to reopen the proceeding for its admission was made or granted. WPPSS had ample opportunity to present rebuttal testi-

mony on this issue and cross-examined PNPC's geologic witnesses at great length. No new facts are cited justifying the use of this extra-record evidence and none appears.

5. The following motions are granted:

(a) WPPSS' motion filed January 4, 1962 for Leave to Substitute Complete Copy of Order of Director of Conservation, State of Washington.

(b) Applicants' joint motion filed January 15, 1962 To Admit Joint Exhibit (Part D through Part K).

(c) PNPC's motion filed January 15 To Reopen Record and Admit Additional Evidence (PNPC's Exhs. 132 and 133).

(d) Joint motion filed January 29, 1962 To Reopen Record and Admit Additional Evidence (1961 Corps Report).

Description of Projects Proposed for Licensing

PNPC's High Mountain Sheep Project, No. 2243

The PNPC design as described by Witness Bonin provides for a variable radius, variable thickness concrete arch dam approximately 670 feet high above the riverbed having a crest length of about 1460 feet at elevation 1520 m.s.l. terminating at a thrust block and spillway on the right bank and a combination gravity dam and thrust block on the left bank (Tr. 182, PNPC Exhs. 13 and 16).

The dam would create a reservoir extending approximately 58 miles upstream on the Snake River to the Hells Canyon tailwater and 10 miles upstream on the Imnaha River. The reservoir would have a normal water

surface of about 17,300 acres and a gross storage capacity of 3,600,000 acre-feet at normal water surface elevation

1510 m.s.l., of which 2,250,000 acre-feet would be usable with a normal drawdown of 173 feet to elevation 1337 m.s.l. Drawdown to 1212 m.s.l. (a drawdown of 298 feet) would provide a total usable volume of 3,100,000 acre-feet (Tr. 228-9). The spillway located on the right bank would be a chute-type design controlled by three 50-foot wide by 50-foot high tainter gates mounted over an ogee section with a flip type bucket at the end to direct discharge into the river. Additional discharge capacity of 65,000 cfs at elevation 1382 m.s.l. would be provided by eight low level discharge valves. The combined discharge capacity of the spillway and sluices would be 300,000 cfs at maximum pool elevation of 1517.5 m.s.l. (Tr. 230, PNPC Exhs. 13 and 16).

The penstocks (18' inside diameter) are of steel and pass through the dam at approximately elevation 1160, then travel from the downstream face of the dam with intermediate supports as required through open cut excavation to the powerhouses.

Two outdoor-type powerhouses would be located one on each side of the river near the base of the dam. The Oregon side powerhouse would initially have three units installed with provisions for two future units. The Idaho side powerhouse would initially have two units installed with provisions for three future units. The initial installation would consist of five generating units with each turbine rated at 285,000 horsepower at a 550-foot net head with full gate opening (PNPC Exh. 13). The turbine would be directly coupled to a generator rated at 175,000 kilowatts (184,000 kilovolt-amperes at 0.95 power factor) making a total turbine capacity of 1,425,000 horsepower and a total generator capacity of 875,000 kilowatts. (For purposes of the comparative plans of comprehensive development, seven generating units are assumed in operation (Tr. 234, PNPC Exh. 16)). Ultimate installation is to consist of ten generating units with a total turbine capacity of

2,850,000 horsepower and a total generator capacity of 1,750,000 kilowatts. The initial and ultimate capabilities will be 1,000,000 kilowatts and 2,000,000 kilowatts, respectively. Fifteen single-phase, 70,000 kva main power transformers would be located on the powerhouse roof connecting to a switchyard located on the Oregon side adjacent to the left abutment of the dam at elevation 1720 m.s.l.[13] The switchyard

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would be connected to the Applicant's proposed interconnected primary transmission system by ties at the Middle Snake Project Substation.[14] The access road would extend 25 miles from Imnaha, Oregon, to the project site (Tr. 202, 231-34, PNPC Exh. 13, Joint Exh. Part G).

WPPSS Nez Perce Project No. 2273

The Nez Perce Project proposed for licensing by WPPSS in its supplemental direct testimony[15] consists of a double curvature concrete arch dam approximately 715 feet high having a crest length of about 1570 feet at elevation 1520

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[13] See Joint Exhibit, Part G, for compilation of physical data.

[14] Suggested transmission lines are as follows:

Three lines to Lewiston, Idaho—230 kv—approximately 43 miles; line from Lewiston to Walla Walla, Washington—230 kv—approximately 71 miles; line from Lewiston to Spokane, Washington—230 kv—approximately 106 miles; line from Lewiston to Anaconda, Montana—230 kv—approximately 234 miles; line from project to Imnaha, Oregon—230 kv—approximately 21 miles; line from project to Portland, Oregon—345 kv—approximately 297 miles (Tr. 3722-23, PNPC Exh. 20).

[15] The project as described above and proposed by WPPSS in supplemental direct testimony differs from the project as described in the application for license as amended and presented in WPPSS' direct testimony (Tr. 10,096-10,118). The principal differences are a change in arch dam geometry, a change in spillway design from a side channel-type to an orifice-type with orifices located near the center of the dam, and a change in type and location of the powerhouse from an indoor-type located across the river just downstream from the toe of the dam to an underground-type located in the left bank.

m.s.l. terminating at a thrust block on the right bank and the canyon wall on the left bank. The dam would create a reservoir extending approximately 63 miles upstream on the Salmon River, 61 miles upstream on the Snake River to Hells Canyon tailwater, and 10 miles upstream on the Imnaha River. The reservoir would have a normal water surface of about 31,000 acres and a gross storage capacity of 6,600,000 acre-feet at normal water surface elevation 1510 m.s.l. of which 3,130,000 acre-feet would be usable with a normal drawdown of 122 feet to elevation 1388 with provision for additional drawdown to elevation 1296.5 for flood control, providng a total usable storage of 4,700,000 acre-feet (Tr. 661-64). The spillway with an approximate capacity of

480,000 cfs would be provided by an orifice-type design consisting of nine orifices each controlled by a 16-foot wide by 30-foot high tainter gate. The downstream lip of these orifices would be at elevation 1230 m.s.l. Additional discharge capacity of about 120,000 cfs would be provided by twelve low level valves (Tr. 10,099; 10,102; 10,114-6; WPPSS Exhs. 142, 143).

An underground powerhouse requiring an excavation of about 85 feet wide by 175 feet high and about 820 feet long located on the Oregon side of the river would house ten generating units. The generator floor would be at elevation 902 m.s.l. Five banks of three single-phase transformers each rated at 155,000 kilovolt amperes would be housed in a transformer hall requiring an excavation approximately 50 feet wide by 43 feet high and 700 feet long. This hall would run parallel to the powerhouse with its floor at elevation 919 m.s.l. Another excavation about 33 feet wide by 40 feet high by 700 feet long with its floor at about elevation 977 m.s.l. would be required for operation of draft

tube gates, and would be connected to the draft tubes by shafts approximately 40 feet by 20 feet extending vertically to the bottom of the draft tubes at about elevation 831 m.s.l. (Tr. 10,070; 10,104-107; WPPSS Exhs. 142, 144).

Initial installation would consist of ten generating units with turbines rated at 290,000 horsepower each at 570-foot head at full gate, directly connected to generators rated 200,000 kilowatts each (210,000 kilovolt-amperes at 0.95 power factor) for a total installed turbine capacity of 2,900,000 horsepower and generator capacity of 2,000,000 kilowatts. Maximum initial capability would be 2,235,000 kilowatts. (Tr. 10,069; 10,022; WPPSS Exhs. 144, 145). Another underground powerhouse is planned for the Idaho side of the river (Tr. 10,160, WPPSS Exh. 142) which would house six more turbines and generators ultimately making the ultimate turbine capacity 4,460,000 horsepower with a total generator capacity of 3,200,000 kilowatts (Joint Exh. Part G). A 345-kilovolt cable will be used to connect the transformers in the transformer hall to the overhead lines at the surface. These overhead lines will then carry the power to a switchyard on the Idaho side of the river approximately one and one-half miles downstream from the dam (Tr. 462, 10,070; 10,093; WPPSS Exh. 15).

The proposed access road to the propect would extend southwesterly from Winchester, Idaho, to the operator's camp and then to the project (Tr. 468, 10,117; 10,234).

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WPPSS' transmission system proposes to integrate the Nez Perce Project with the Bonneville Power Administration grid, and assumes construction and wheeling by BPA. (WPPSS' br. pp. 29, 159, Tr. 583, 5820). Four basic 345 kv steel tower lines are proposed, extending from Nez Perce to Santiam, Oregon, to McNary, Oregon, to Lewiston, Idaho, and to Spokane, Washington, for a total distance

of 634 miles, plus a possible line to Pocatello, Idaho, for an additional distance of 338 miles (Tr. 5,788). At the terminus of each of the lines a 600 mva 345/230 kv step-down substation with auto transformers is proposed (Tr. 586).

WPPSS' High Mountain Sheep Project No. 2273

WPPSS presented a High Mountain Sheep Project in its rebuttal testimony (WPPSS Exhs. 264-267) at the same site as PNPC's project, river mile 189.2 on the Snake River. The project, for which WPPSS seeks a license, if its Nez Perce application is denied, consists of a double curvature concrete arch dam approximately 670 feet high having a thrust block and spillway on the right abutment and a thrust block on the left abutment with an overall crest length of 2040 feet at elevation 1520 m.s.l. The dam would create a reservoir extending about 58 miles upstream to Hells Canyon tailwater on the Snake River and 10 miles upstream on the Imnaha River. The reservoir would have a normal water surface of about 17,300 acres and gross storage capacity of 3,600,000 acre-feet at normal water surface elevation 1510 m.s.l. of which 2,250,000 acre-feet would be usable with a normal drawdown of 173 feet to elevation 1337. The spillway would be of the chute-type design controlled by three 50-foot wide by 60-foot high tainter gates. Additional discharge capacity would be provided by seven low level outlets. An indoor-type powerhouse would be located on the Idaho side of the river near the base of the dam with an initial installation of six units (Tr. 12,940). Provisions would be made to house four similar units in a future underground powerhouse on the Oregon side (Tr. 12,942, WPPSS Exh. 264). The initial installation would consist of six generating units with each turbine rated 290,000 hp at 550-foot head and each generator rated 200,000 kw (210,000 kva at 0.95 power

factor), for a total installed turbine capacity of 1,740,000 hp and generator capacity of 1,200,000 kw with 2,900,000 hp and 2,000,000 kw ultimately (Tr. 13,054). Maximum initial capability would be 1,377,000 kw. Nine single-phase, 155,000-kilovolt-ampere, power transformers would be located on a transformer deck adjacent to the powerhouse (Tr. 13,055). Location of the switchyard facilities has not been defined.

Access to WPPSS' High Mountain Sheep site will be by road which would go downstream on the right side of the river and cross the Salmon River at about mile 0.5 and then to Winchester, Idaho (Tr. 12,940).

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Safety and Stability of Dam Sites and Structures
High Mountain Sheep Dam Site

Both applicants agree that the High Mountain Sheep site, located on river mile 189.2, is safe and adequate for a thin arch dam (PNPC br. 106, WPPSS br. 63, Tr. 12, 134, 12,317). The canyon walls consist of meta-volcanic rock, about 200 feet apart at normal river level, rising steeply above the river. Crest length to height ratio is estimated to be 2.2 to 1 (Tr. 179-181). However, WPPSS witnesses Schultz and Thompson believe that considerably more exploratory work must be done before designs are finalized and that the PNPC's estimate of $90,000 for this work is inadequate. Additional exploration will, of course, be necessary before construction can proceed to establish foundation lines, the extent of foundation treatment, and other details required for final design. The Staff recommends that the result of additional geological exploration "should be passed on by an independent board of qualified experts before any construction can be started." This recommendation is incorporated in Article 32 (p. 244) of the Staff's proposed order.

(27462)

Obviously, the Commission will need technical assistance to fix foundation lines and other details for final design purposes. To this extent, the advice of qualified consultants is necessary and desirable. It is the Commission's responsibility, however, to determine the safety and adequacy of the dam site and to approve the final design of the arch dam. This responsibility cannot be shared with a so-called "independent board." The record establishes, and I find, that the High Mountain Sheep dam site is safe and adequate to support the proposed arch dam and related structures.

Nez Perce Dam Site

The adequacy and safety of the Nez Perce Dam site, a critical issue in this proceeding, produced over 2000 pages of conflicting expert testimony. WPPSS witness Schultz testified that the foundation rocks are "favorably oriented with respect to the direction of thrust from the arch dam loads" (Tr. 560) and that the site is geologically adequate for the revised WPPSS designs, including the proposed powerhouse (Tr. 9870). WPPSS witnesses Geuss and Willey of the Harza Engineering Company agree that the site is suitable for a thin arch dam. Another witness for WPPSS, geologist Thompson, testified that it would be impossible for the huge mass of rock on the right abutment to be moved by the thrust of the dam (Tr. 12,385).

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All three PNPC witnesses concluded that the Nez Perce Dam site was not suitable for the proposed thin arch dam and related structures. No Staff[16] witnesses testified on

[16] The Staff concluded, however, that "In the light of the evidence in the record, the Nez Perce site cannot be accepted as safe and adequate, regardless of the condition of the right abutment, until a stability analysis has been completed with actual subsurface information." (Staff br. pp. 32-33).

the adequacy and safety of the various dam sites. PNPC witness Fox made the most thorough investigation, spending eight days in the mapping of the Nez Perce site (Tr. 11,526-11,561, PNPC Exh. 89), and walking over all significant faults and areas inaccessible from the river, after transportation to such areas by helicopter. He testified that

> . . . Of the 121 faults and fractures I have mapped as representative of geologic conditions at Nez Perce, and the many more I have observed and not mapped, there is not one that is "favorably oriented" from the point of view of thrust from arch dam loads (Tr. 11,554-5).

When asked his opinion as to the geological feasibility of a Nez Perce arch dam, Fox stated that ". . . a stable abutment cannot be found in the left part of the canyon wall, in the general area of the proposed axis" (Tr. 11,558). After reviewing the proposed left abutment outline on the overlays (PNPC Exhs. 93 and 106) he concluded that

> . . . no further consideration should be given to an arch type of dam for the Nez Perce site. I am certain that further exploration cannot possibly overcome the impossible and unsatisfactory conditions now apparent at the Nez Perce site (Tr. 11,559).

Fox testified that movement has already taken place in the left abutment down the dip of flow plane L35 (Tr. 11,697-700), that the probability of movement in the future is greater (Tr. 11,722), and that the fractures are probably open for a depth of 150 to 200 feet (Tr. 11,702).

PNPC witness Livingston, an expert in rock mechanics[17] —the behavior of rocks under stress—spent five days in a detailed exploration of the Nez Perce site (Tr. 11,853-5). He interpreted and analyzed the principal faults, fractures and geological features, mapped most extensively by Fox on PNPC Exh. 89, determining the actual planes of rock as indicated by surface measurements of their strikes and dips and the projection of their planes underground. He concluded that the slabs of rock resting on L35 and L17 in the left abutment show definite evidence of movement and have already failed at point F in picture No. 2 of PNPC Exh. 106 (Tr. 11,830, PNPC Exh. 93, Field Picture Nos. 4, 7, 8, 9, 10). The forces of gravity plus the thrust of the arch dam will tend to move the slabs of rock resting on L35 downstream along L35 as a sliding surface. He then made a stability analysis assuming no shear resistance along fault L35 on the basis of the evidence of vertical movement[18] along fault L35 (Tr. 11,827, PNPC Exh. 129). If shear resistance (C) becomes zero (Tr. 13,868), the ratio between stabilizing and sliding forces, utilizing the shear friction formula (WPPSS Exh. 21),

$$\frac{Q = FV + CA}{H}$$

is 0.65-1 (Tr. 12,095, 13,853). Since the forces which tend to make the mass slide are larger than the forces which

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[17] "It is obvious that the immediate future will witness a great emphasis on further development of the science of rock mechanics" (Engineering News—Record p. 26, July 13, 1961).

[18] Livingston testified with regard to L35: "I have observed a relative displacement near river level of eight inches, and I am of the opinion that the absolute displacement already is in excess of two feet . . ." (Tr. 11,827; see PNPC Exh. 129).

tend to stabilize, this analysis indicates that the left abutment will fail.

WPPSS witness Veltrop made a similar stability analysis assuming shear resistance in faults L35 and L17 (Tr. 13,155). His favorable geological assumptions produced a favorable stability analysis—5.1 at the left abutment (Tr. 13,125)—a shear-friction factor above 4.0, normally regarded as an adequate factor of safety against sliding along the joints (Tr. 13,132). Veltrop, a highly skilled arch dam designer, concluded that "the foundation rock at Nez Perce is very adequate indeed to support the loads imposed on it by the arch dam" (Tr. 9,987).

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The difficulty lies in Veltrop's favorable geological assumptions. An arch dam is no safer than the subsurface on which it rests.[19] There is substantial evidence in the record that shear has already taken place in the fractures at the left abutment. Consequently, adequate shear resistance cannot be assumed with safety.

The evidence of movement in the left abutment comes from experienced, thorough and qualified geological witnesses (Fox and Livingston) who made the most detailed analysis in the proceeding. While the results of subsurface exploration leave a wide margin for interpretation, the Commission cannot assume the existence of favorable subsurface conditions in the face of specific evidence of instability. On the contrary, it should assume the worst foundation conditions compatible with the available data of probative value. On this basis, there is sub-

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[19] See Bonin's testimony (Tr. 3072-3) "the real problem is in the foundation rather than in any fear of buckling." The Malpasset Dam collapse has been attributed to movement in the left abutment due to sliding along a seam of weak material (Engineering News—Record, February 15, 1962, p. 58, Karl Terzaghi).

stantial doubt in the record as to whether the left abutment at the Nez Perce site will safely support the thrust of the proposed arch dam.

WPPSS supports the geological adequacy and safety of the Nez Perce site with the results of its unconfined compression tests, water pressure tests, abutment stability analysis, and the geological appraisals of Schultz and Thompson. The issue raised, however, is not the compressive strength of individual rock specimens but of the abutment as a structural unit. If, as has been testified, the left abutment is already parted by major faults and fractures which provide natural sliding planes dipping downstream and riverward, and movement has already taken place, these tests do not establish stability. No water pressure tests or drill holes were made by WPPSS in the critical area of the left abutment where PNPC witnesses testified movement has taken place.

WPPSS witness Thompson testified:

> . . . None of the holes on the left side of the canyon, i.e., Holes NP-6, NP-1 or NP-2, encountered what I would classify as unsound rock below comparatively shallow depths. Therefore, there is no valid justification for assuming that unsound rock is present in the left abutment area at the depth to which abutment excavation would be made. (Tr. 12,424).

WPPSS Exhibits 24-A, 135 and 136 reveal, however, that drill holes NP-1 and NP-2 are located at the river's edge slightly upstream from the left abutment area and at an elevation below this area, and that drill hole NP-6 is so located that the bottom of that hole is more than 20 feet above the point where the crest of the arch dam would

contact the abutment. (See PNPC Exh. 93, field pictures 19 and 20; and PNPC Exh. 106, picture No. 1).

WPPSS Witness Schultz testified:

> Q. Dr. Schultz, the hole NP-6 was drilled to an elevation of 1546, according to WPPSS Exhibit 24-A, approximately 26 feet above the top of the dam, and holes NP-1 and NP-2 started respectively at elevations 905 and 900.
>
> Now, it appears therefore that you do not have any drill hole at all in the left abutment of the proposed arch dam, is that correct?
>
> A. That is essentially correct. (Tr. 5640).

Schultz's explorations were confined to the abutment areas below elevation 1300 m.s.l. on the left abutment and between elevations 1300 m.s.l. and 1400 m.s.l. on the right abutment.

Similarly, there are no water pressure tests from the left abutment area of the proposed arch dam. Moreover, Schultz acknowledged that the left abutment contained unstable areas. Thompson spent less time at the site and made no calculations to support his optimistic interpretation of conditions at Nez Perce or his pessimistic evaluation at Lower Canyon. Consequently, I find the testimony of Fox and Livingston more persuasive with respect to the instability of the left abutment at Nez Perce, and geological conditions at Lower Canyon.

The evidence as to the instability of the left abutment has produced post hearing developments. WPPSS' reply brief (IV-33) states that after the filing of the initial briefs it had two unidentified geologists visit the site and examine L-35 and L-17. This "new" evidence is then discussed at

some length to refute the testimony of Livingston and Fox.[20]

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WPPSS then suggests (p. IV-35) "that the record be reopened if the Examiner or the Commission should have any doubt as to the stability of the left abutment." WPPSS had every opportunity to rebut the geologic testimony of PNPC's witnesses Fox and Livingston during the hearing. The Commission's Rules of Practice and Procedure provide an orderly method by which WPPSS may file a petition to reopen the proceeding for the purpose of taking additional evidence. No such motion or petition has been filed nor have any facts been set forth requiring or justifying reopening of the extended and voluminous record in this proceeding. Obviously, the suggestion that the record be reopened to satisfy any doubts the Examiner or the Commission may have with regard to the stability of the left abutment may be made equally with regard to any doubts adverse to WPPSS' contentions.

If the sole bar to licensing Nez Perce were doubts as to the stability of the left abutment it could be argued that the record should be reopened not for the admission of the unspecified "evidence" of unidentified geologists, but for additional testimony of designated geologists after further extensive geological exploration and investigation. But as indicated elsewhere throughout this decision, the public interest does not require the licensing of Nez Perce, and

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[20] On June 11, 1962, PNPC filed a motion to strike WPPSS' reply brief on the basis of its "references to factual and opinion evidence that is not in the record." The motion states in part (p. 14) "we could counter the purported new geological testimony by introducing the results of our own further investigation, necessarily undertaken after the reply brief of WPPSS was received, which shows the alleged geological features do not exist as claimed in the WPPSS brief. But such a riposte would only add error to error."

the prompt optimum development of the Middle Snake would best be served by licensing High Mountain Sheep.

Lower Canyon Dam Site

No one is applying for a license to build Lower Canyon at this time. Its geology is relevant, however, since it is an essential part of the High Mountain Sheep plan for comprehensive development of the Middle Snake River, recommended by both PNPC and the Staff.

WPPSS contends that the Lower Canyon site at mile 3.7 is geologically infeasible as a site for a dam of any type and suggests a more expensive rock-fill dam at mile 0.5 as feasible. It relies on the alleged conclusions of the Corps of Engineers, citing its 1958 study of the Middle Snake River as follows:

> Investigation shows that the joint or fracture systems occur throughout the area and where their strikes parallel the course of the stream, the valley walls are unstable even though of hard durable rock. Between river mile 3 and 5, the river parallels these fracture trends, and recent and ancient rock falls and slides of large magnitude can be observed. Consequently, this reach is not considered suitable for a dam of the height proposed. (Vol. 1, p. 272) (WPPSS br. p. 69).

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This 308 report was preliminary with no indication of any detailed foundation investigation. It does not reflect the later study of Bonin, Fox, and Livingston in this record or the more recent report of the Chief of Engineers dated March 31, 1961, which contains the following comment: (p. 8)

> . . . Since the preparation of the Divison Engineer's report, the results of additional investigations at the

> High Mountain Sheep and Lower Canyon sites have become available, which indicate rather conclusively that a concrete arch dam is feasible at the High Mountain Sheep site. This dam, built to provide a full pool at elevation 1510, would cost roughly $44 million less than the concrete gravity section dam proposed by the Divison Engineer, but raised to the same elevation ($198 million vs. $242 million). *There is some chance that an arch dam also might be substituted for the more expensive rock fill dam at the Lower Canyon site, but a conclusion cannot be reached until further borings are made. This additional study can wait until the advance engineering and design stage immediately prior to initiating construction.* (*Emphasis supplied*)

WPPSS also relies on the testimony of Schultz and Thompson: Schultz spent one day at the mile 3.7 site and inspected the 0.5 site by boat and not from the ground. He did not testify that an arch dam could not be built at the Lower Canyon site, but rather that the amount of excavation required to insure stability would make construction uneconomical (Tr. 12,115). Thompson was more affirmative. He concluded that the thrust of an arch dam would cause failure at the abutments of the mile 3.7 site (Tr. 12728).

The Staff takes the position that more extensive geological exploration is necessary "before it can be said that the Lower Canyon site can or cannot be used as a site for an arch dam." (Staff br. p. 36)

The feasibility of this site was supported by PNPC witnesses Bonin, Fox and Livingston. Fox spent about three weeks examining this site (Tr. 11,744). Bonin testified that he examined the fault system mentioned in the Division Engineer's report very carefully before he concluded that

the site was suitable for an arch dam (Tr. 204). Exploratory work included three core borings in the right abutment and eleven test pits (PNPC Exh. 16, p. 101). The three diamond drill holes were pressure tested with satisfactory results. Livingston made a stability

analysis of the Lower Canyon right abutment against the thrust of the PNPC arch dam using the same assumptions at critical points that he used at Nez Perce—no shear resistance along fault R12. He found it to be stable with a safety factor of 2.44 (Tr. 12,042).

I am persuaded that the geological adequacy of Lower Canyon is sufficiently established to justify its inclusion in proposed plans for the comprehensive development of the Middle Snake River. Its significant geological features have been extensively identified, measured and mapped. Thompson's contrary testimony is based on insufficient site investigation, an absence of precise measurements and calculations, and the application of different assumptions as to the depth or extension of faults and fractures at Nez Perce and Lower Canyon (Tr. 12,710-1, 12,736, 12,756).

More extensive geological exploration will be necessary, however, to support any license application for a thin arch dam at Lower Canyon.

Designs of Project Structures

There are many different designs in the record and many hearing days were spent in cross-examination on hundreds of design details (See PNPC br. 133-240). These differences do not significantly affect the operation or power benefits of the various projects. They do affect substantially the capital cost estimates and the economic evaluation of the rival projects and alternative plans.

Moreover, these designs are not construction designs or plans. They are preliminary designs provided for the purpose of Federal Power Commission license proceedings. Neither the applicants nor their witnesses assume any obligation to maintain construction costs within the amounts estimated for these preliminary designs.

The designs proposed for High Mountain Sheep by PNPC and WPPSS raise no important problems provided the licensee proceeds with the more refined analysis and study necessary for final, detailed construction designs. The adequacy and safety of the revised Nez Perce designs[21] (WPPSS Exhs. 139-145), however, are contingent upon the geology of the site. WPPSS witness Willey explained that the greatest single reduction in cost in the latest revised Nez Perce design is achieved by the use of an underground powerhouse which permits placing the spillway and outlet works in the middle of the dam, thus eliminating considerable excavation and concrete (Tr. 10,098, 10,124-7, 10,130).

On the basis of the geological testimony of Fox and Livingston there is considerable doubt as to whether an underground powerhouse is feasible. Fox testified he could not recommend an underground powerhouse until extensive further underground exploration was completed (Tr. 11,556). Livingston testified that construction of these underground powerhouses, even if possible, would be very costly (Tr. 11,826). If the underground powerhouse design is abandoned, the cost of the necessary design revisions will radically affect the total project cost and the comparative economics of the rival plans.

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[21] The last change in designs produced a $32,900,000 reduction in the cost estimates—$340,900,000 to $308,000,000.

The Staff recommends that, "since neither proposed project has been finally designed nor foundation fully explored . . .", the following general conditions should apply to either Nez Perce or the High Mountain Sheep Project, whichever is licensed for construction:" (Staff br. p. 47)

(1) The final design of the arch dam shall be verified by an acceptable method of analysis (such as the trial-load method) (Tr. 1498), using design criteria mutually agreeable to the Licensee and the Commission staff;

(2) The final design of the arch dam shall also be reviewed by the use of structural models (Tr. 1498, 2215, 2219, 2220);

(3) The spillway for the project shall be reviewed and modified, if necessary, by the use of hydraulic models which demonstrate the flow capacities and characteristics for the various reservoir water surface levels, operation of various combinations of gates, and for effect of discharge on other project structures (Tr. 2143, 2215, 3147-8) including vibration studies;

(4) The final design of the dam and other project structures shall be reviewed by an independent Board of Consulting Engineers;

(5) Consideration shall be given to prestressing the joints of the dam with grout pressure in order to improve the stress distribution in the dam (Tr. 2193, 3074-A);

(6) Consideration shall be given to the effect of spray from spillway operation in locating transmission lines leading from the dam (Tr. 2518-19); and

(7) The method of foundation treatment shall be approved by the Board of Consulting Engineers mentioned in (4) above (Tr. 4762).

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Flood Control

The initial flood control goal of the Corps of Engineers in its Main Control Plan (H.D. 531)—limiting the 1894 flood flow from 1,240,000 cfs at the Dalles to a peak flow of 800,000 cfs—can be achieved by construction of Canadian storage (8.45 million acre-feet) and the Libby Project (5 million acre-feet). The further goal, reduction to 600,000 cfs, will require additional storage of 7.6 million acre-feet, or a total of 325 million acre-feet of usable storage.[22] Projects now in being or under construction will provide 8.3 million acre-feet. The flood flows of the Snake and Salmon Rivers amount to 6,180,000 acre-feet (Tr. 712).

Flood control storage is provided for at Nez Perce, High Mountain Sheep and Lower Canyon. China Gardens and Whitebird provide only pondage.

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[22] (Corps Report, March 31, 1961, p. 5)

Storage conditions	1894 Flood at The Dalles, cubic feet per second	Usable Storage, millions of acre-feet	
		Total required	Available from projects existing or under construction
a. 1894 conditions	1,240,000	..	..
b. Existing, and under construction	1,030,000	8.3	8.3
c. Initial flood control objective	800,000	17.3	10.8
d. Canadian and Libby storage added to existing and under construction	720,000	24.6	11.2
e. Ultimate flood control objective at The Dalles	600,000	32.5	11.5

(Footnotes omitted)

Applicants have agreed that the annual flood control values as shown on page 10 of PNPC Exh. 19 may be used for purposes of comparison.[23] While flood control storage for the High Mountain Sheep Plan exceeds that of the Nez Perce Plan by about 10 percent, the annual value differential is about one percent. This analysis indicates that the flood control benefits of the two plans are substantially equal for comparative purposes (Staff br. p. 186).

Recreation

WPPSS witness Yeomans, a landscape architect, expressed the belief that the recreational potential of the Nez Perce project "would exceed Grand Coulee . . . within about five years after its completion" (Tr. 724). PNPC witness Robinson, Chairman of its Board of Directors, described extensive picnic and boating facilities planned for High Mountain Sheep at an estimated cost of $500,000 (Tr. 149-151; 1781, 1866-67, 1958).

The Staff considers the recreational benefits of the two plans similar—"what can be said for one can be said for the other" (Staff br. p. 144). If the comparison is limited to the two projects, construction of the High Mountain Sheep dam would leave undisturbed stream side fishing on

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[23]

	Usable Storage acre-feet	Without Canadian Storage		With Canadian Storage
		1968	1985	
High Mountain Sheep	2,250,000	$1,840,000	$2,260,000	$240,000
Lower Canyon (mile 3.7, Elev. 1595)	3,265,000	3,500,000	4,300,000	370,000
	5,515,000	5,340,000	6,560,000	610,000
Nez Perce	5,015,000	$5,300,000	$6,500,000	$560,000
Difference HMS Plan over NP Plan	500,000	40,000	60,000	50,000

the Salmon River and the sports fishery in the Idaho area. An estimated 811,350 juvenile steelhead were caught by angling in Idaho waters in 1958 (INT. Exh. 10) in an estimated 113,898 fishing trips. The letter reports of the Department of Agriculture (FPC Exhs. 39, 40) recommend license provisions to insure adequate recreational use of the reservoir areas.

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Navigation

The proposed projects and plans of development will open large areas to transportation by boat now virtually inaccessible. The Corps of Engineers has recommended the same license conditions for both projects (FPC Exhs. 37, 38) to insure maintenance of downstream navigation channels.

Power Output

(1) The Rival Projects

The proposed Nez Perce project would develop the head on the Snake River between the Nez Perce site at river mile 186.2 and the Low Hells Canyon site at river mile 247.3 and the head on the Salmon River from its mouth to river mile 63.0. The proposed High Mountain Sheep project would develop the head on the Snake River between the High Mountain Sheep site at river mile 189.2 and the Low Hells Canyon site. Power output is based on streamflow available at the Nez Perce and High Mountain Sheep sites from historical flows for the 1928-1948 period modified by upstream irrigation depletions (Prehearing Conference Exhs. 15 through 20).

Both the High Mountain Sheep project and the Nez Perce project would have an overlap on the Low Hells Canyon development tailwater of about 35 feet. An agreement will be required between the Idaho Power Company

and a licensee for a project in the Middle Snake River to compensate the former for losses resulting from the effects of the overlap (Tr. 193-4).

The Chief of Engineers in his letter report dated March 31, 1961, transmitting the Division Engineer's Report to the Secretary of the Army, stated that during detailed study and design it may be found advantageous to construct the High Mountain Sheep dam to provide a reservoir pool a small amount higher than elevation 1510.

To determine power output, operation of both projects has been coordinated with the Northwest Power Pool[24] (Tr. 276, 278, 641). The system power development was assumed to be approximately 16,000,000

kilowatts when either the High Mountain Sheep project or the Nez Perce project comes into service.[25] Reservoir drawdown for either project would normally begin September 15, continuing until April 15, with drawdown depending upon forecast operation.

Witness Alspaugh (PNPC Exh. 17) estimated the dependable capacity of High Mountain Sheep to be 930,000 kilowatts with an initial installed capacity of 875,000 kilowatts and average annual energy generation to be 5,483,000,000 kilowatt-hours (626,000 average kilowatts). The Staff estimates a dependable capacity of 930,000 kilowatts and an average annual energy generation of 5,195,000,000 kilowatt-hours (593,000 average kilowatts) (FPC Exh. 21).

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[24] See Joint Exhibit Part F. The Northwest Power Pool is a voluntary arrangement among thirteen utilities of the Pacific Northwest area for the coordination of the operation of the affected systems. Participating utilities include all utilities that have major hydroelectric facilities in the Northwest.

[25] Output data at the project sites are estimated by PNPC and WPPSS in Tables 1 and 1A of Joint Exhibit Part I.

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The initial installed capacity proposed by WPPSS for the High Mountain Sheep project is 1,200,000 kilowatts. With this capacity and assuming coordinated operation, WPPSS estimated the dependable capacity to be 1,218,000 kilowatts and the average annual at-site generation to be 5,720,000,000 kilowatt-hours or 653,000 average kilowatts.

WPPSS estimated the dependable capacity of the Nez Perce project to be 1,850,000 kilowatts with an installed capacity of 2,000,000 kilowatts and average annual at-site generation of 9,417,000,000 kilowatt-hours or 1,075,000 average kilowatts. The Staff estimate of the power output for the Nez Perce project is a dependable capacity of 1,867,000 kilowatts and an average annual energy generation of 8,532,000,000 kilowatts or 974,000 average kilowatts (FPC Exh. 22).

The Comparative Plans

The power potentials of the rival plans[26] of development are set forth in Tables 2 through 5 of Part I, Applicants' Joint Statement, for the four different levels of development assumed by the applicants during the initial and subsequent period. The initial period assumes a system power development of approximately 16,000,000 kilowatts when either High Mountain Sheep or Nez Perce comes into service. The subsequent period

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assumes a system power development of approximately 30,000,000 kilowatts. The prehearing conference report (p. 6) established the 1968 and 1985 systems for the comparative studies.

[26] High Mountain Sheep Plan includes High Mountain Sheep, Lower Canyon, China Gardens; Nez Perce Plan includes Nez Perce, Whitebird, and China Gardens.

Loads and Resources

In the prior (1956-57) proceeding, Project No. 2173, the Presiding Examiner concluded that by 1965 PNPC's four organizing companies will have serious deficiencies in dependable power capacities.[27] This conclusion is equally valid in 1962. PNPC's witness Porter presented an estimate of electric loads and resources for each of the four organizing companies and totals for the four companies on a fiscal year basis, 1961-1970.[28]

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27 (Initial Decision p. 17)

"It is clear from the foregoing that the production from all present plants and all plants proposed as above described will fall short of meeting the power requirements of the four organizing companies. It is estimated that after 1964, there will be substantially no firm power available to these companies from any of the federal projects because of requirement contracts between Bonneville and its preferential customers. Consequently, it is incumbent upon these public utilities to take prompt action to provide additional supplies of power."

28 Estimates of Electric Loads (PNPC Exh. 28)

Operating Year	Peak Load Megawatts	Energy Load in Megawatts	
		Average Annual	Average Storage Control Period
1960-61	3,215	1,947	2,030
1964-65	4,137	2,490	2,599
1969-70	5,650	3,373	3,526

Estimates of Electric Resources
(1936-37 Water Conditions)

Operating Year	Firm Resources in Megawatts	
	Average Annual Energy	Average Energy Storage Control Period
1960-61	1,530	1,595
1964-65	1,996	2,084
1969-70	2,103	2,198

These resources include all presently owned hydro facilities plus resources under firm purchase contracts covering the Priest Rapids, Wanapum, and Rocky Reach Projects. They do not include power available under 20-year BPA contracts since power is not assured to the PNPC sponsor companies after August 31, 1964.

The estimates of area load requiremnts and resources presented by the applicants and staff for the Pacific Northwest are substantially similar.[29]

29

Estimates of Electric Loads

Operating Year	PNPC Exhibit 30 Peak Load	PNPC Exhibit 30 Energy Load	WPPSS Exhibits 63 & 160A Peak Load	WPPSS Exhibits 63 & 160A Energy Load	STAFF Exhibits 28 & 29 Peak Load	STAFF Exhibits 28 & 29 Energy Load
1960-61	10,215	6,885	NA	NA	9,680	6,450
1964-65	12,819	8,407	12,910	8,890	12,118	8,390
1969-70	17,004	10,751	18,009	12,430	16,430	11,505

(Note—Peak load is in terms of megawatts
Energy load is in terms of average annual energy in megawatts
Staff energy load converted from kwh)

Estimates of Electric Resources
(1936-1937 Water Conditions)

	PNPC Exhibit 30	WPPSS Exhibit 63
1960	6,863	N.A.
1964-65	8,319	8,473
1969-70	9,248	9,525

WPPSS has no electric facilities and its loads[30] will be those acquired by contract.

All three forecasts indicate deficiency beginning by 1965, and increasing substantially in each year thereafter. Even if High Mountain Sheep was in service in 1966-1967, PNPC's organizing companies would still have a power deficiency (PNPC Exhs. 28, 30). BPA power under the 20-year contract cannot be relied upon as a firm resource since the four companies have been given notice by BPA that there is no assurance that power will be available for them after 1963-1964 (Tr. 2307, 2328-30, PNPC Exh. 29). PNPC's organizing companies, therefore, will require the entire output of High Mountain Sheep as soon as it can be expected to come into operation. Absent High Mountain Sheep, the four sponsor companies may be forced to build alternative high cost thermal plants (Tr. 397-398). The availability of Canadian storage would delay the need for

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[30] These are estimated by witness Hurd for public agency participants and public agencies in the BPA service area as follows: (WPPSS Exh. 112)

Estimates of Electric Loads of Nez Perce Public Agency Participants

Operating Year	Peak Load Megawatts	Average Annual Energy Load in Megawatts
1966	1,900	1,016
1971	2,600	1,324

Estimates of Electric Loads of Public Agencies in BPA Service Area

Operating Year	Peak Load Megawatts	Average Annual Energy Load in Megawatts
1966	4,800	2,626
1971	6,200	3,379

* Converted from kwh.

either project about one and one-half years (PNPC Exh. 42-A, Tr. 2391).

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BPA has assured all public agencies that it can take care of their electrical requirements until 1970 (Tr. 4320, 10,574). WPPSS estimates that the total load of the[31] public agencies that have signed options to purchase Nez Perce power will be 1324 average annual megawatts in 1971; it estimates the total output of Nez Perce at 1,166 average annual megawatts (WPPSS Exh. 40 Rev.). Clearly, therefore, Nez Perce will not be needed to meet the load of public agencies in the Pacific Northwest, including WPPSS until after 1970. The basic market for Nez Perce power before 1971, therefore, is that furnished principally by the deficiency of the PNPC organizing companies (PNPC Exhs. 28, 30, 42, and 42-A).

Economic Feasibility

While they dispute each other's cost estimates, PNPC and WPPSS are agreed that both the Nez Perce and High Mountain Sheep projects are economically feasible for construction under license within the range of interest and discount rates of record and within such fluctuations thereof as are reasonably predictable.

The economic feasibility of both projects is graphically illustrated in Table 2 of the Staff's brief (p. 78) which shows in tabular form the installed capacity, output, annual value, annual cost and excess of value over cost for each project, as found in the record. This table, however, does not contain an estimate of the output of the High Mountain Sheep project with an installed capacvity of

[31] These utilities are assured of all federally generated power, in excess of that sold for industrial purposes, by virtue of the preference clauses in the several federal marketing acts (See Section 4(a) of the Bonneville Act).

1,200,000 kilowatts. With this adjustment,[32] the estimates of annual costs and values in Table 2 are adopted as reasonable and proper for the limited purpose of demonstrating the economic feasibility of both projects.

Financial Feasibility

The requirements for financial feasibility include adequate statutory authority, a satisfactory tax situation, long-term power sales and wheeling contracts, construction bids at prices comparable with estimates, reasonable net interest costs, and bonds to be delivered with the unqualified approval of a nationally recognized firm of municipal bond attorneys (Tr. 842-3, 851-2).

The basic requirement, however, is an assured market for the power to be generated. A sufficient percentage of the output of the project must be sold under firm long-term power contracts to responsible utilities or other major responsible users at rates adequate to pay all costs. *City of Seattle, Washington,* 26 FPC 54 (July 10, 1961, pet. for rehearing den. Sept. 6, 1961). The more firm the anticipated revenues, the more favorable the relationship between anticipated revenues and costs, the greater is the applicant's ability to finance the project.

Pacific Northwest Power Company

PNPC's plan of financing was described by witnesses Robinson, Chairman of the Board of Directors of PNPC, and Gordon, a senior partner in Kidder, Peabody & Co., a leading investment banking firm. The four organizing companies, whose financial standing and credit are not questioned, have committed themselves to execute "take-or-pay" power purchase contracts covering the entire project output at annual payments equal to financing, operating,

[32] See Appendix C.

maintenance, and other annual charges (PNPC Exhs. 32-35). The arganizing companies intend purchasing the 15 percent equity proposed for PNPC, then to secure a revolving bank loan of 60-70 million dollars to minimize interest charges during construction, and finally to float a public bond issue of about 222 million dollars secured by a first mortgage on the property (Tr. 1738, 1741, 1755-6, 4177). Gordon testified that the bonds would be readily saleable at interest rates ranging from 4.80 to 5 percent at any debt-equity ratio from 65 percent to 90 percent (Tr. 402-3, 4127). The equity, if sold to the public, would be readily marketable (Tr. 4160).

Both WPPSS and the Staff question the alleged absence of a plan of financing and the "controversial 85-15 percent debt-equity ratio." The Staff agrees that there are special circumstances where a higher debt-equity ratio than the conventional 60-40 is justified citing *In the Matter of Ohio Valley Electric Corporation, et al.*, 36 S.E.C. 304, where an eventual debt-equity ratio of 97½ to 2½ percent was approved on the basis of a contract by the Atomic Energy Commission for the entire output.

The combined equity ratio of PNPC and its sponsor companies as of December 31, 1960, using a capitalization of $257,100,000 for PNPC, would be as follows: long term debt, 65.48 percent ($821,409,000), Preferred Stock 4.35 percent ($54,621,000), Common Equity 26.86 percent ($336,-933,000), Deferred federal income taxes 3.31 percent ($41,-583,000). See Annual report for 1960, Item D by reference. The ability of the sponsor companies to finance their participation in the proposed project has not been questioned.

Moreover, as noted by the Staff (p. 90) the proposed ratio is flexible and will be set at the time of financing "at the ratio producing the lowest cost to the consumer, with adequate security to the investor, and subject to approval of regulatory agencies having jurisdiction" (PNPC br. p.

54). The Staff recommends that any PNPC license be conditioned so as to require submission of a complete plan of financing prior to the beginning of construction and execution of appropriate long term power contracts. Whether or not, as argued by WPPSS, PNPC and its organizing companies will be subject to the Public Utility Holding Company Act is not now before this Commission and is outside the scope of this proceeding. This issue was raised in the prior proceeding, Project No. 2173, where the Presiding Examiner commented as follows: (p. 34)

> Section 204(f) of the Act states that the provisions thereof shall not extend to a public utility organized and operating in a state under the laws of which its security issues are regulated by a state commission. It appears that the regulatory agencies of the States of Washington, Oregon and Montana do exercise regulation over the securities of the organizing companies.
>
> The fact remains, and it is a fact which is recognized by all of the parties to this proceeding, that the Applicant's capital structure, its debt-equity ratio, and the sale and disposition of its securities will be subject to the supervision and authority of the Securities & Exchange Commission and that the approval of that Commission must be procured before the financing can be accomplished.
>
> Section 318 of the Act specifically excludes from the jurisdiction of this Commission those who are with respect to the issue, sale, or guarantee of securities or the acquisition or dispostion of any securities subject in those respects to the jurisdiction of the Securities & Exchange Commission. There is implicit in every license the requirement and the expectation that the licensee will act in accordance with the laws of the United States. It will not be assumed here, therefore, that the Applicant will not comply with such laws or

the regulations of the Securities & Exchange Commission or any other Government agency established in accordance therewith.

Washington Public Power Supply System

William R. McGill of Wainwright and Ramsey, John T. Monzani of Kuhn, Loeb & Co., and E. Barron Rockwell of Halsey, Stuart & Co. testified as financial witnesses on behalf of WPPSS.

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Under the original plan of financing drafted by Wainwright and Ramsey, consultants in municipal financing, a total of $463,000,000 was to be raised by revenue bonds (Tr. 822-3, WPPSS Exh. 77) as compared to $391,080,000 for the revised Nez Perce design[33] (WPPSS Exh. 161) sub-

[33] The proceeds under the two plans would be applied as follows: (Staff br. p. 92)

Item	WPPSS Exh. 77	WPPSS Exh. 161 Rev.
Construction Costs (Including costs of engineering and contingencies)	$340,900,000	$308,000,000
Working Capital (Recommended by Harza Engineering (Tr. 830))	2,000,000	2,000,000
Bond Reserve (Equivalent to one year's interest @ 4-3/4% and to be maintained as long as any bonds are outstanding (Tr. 830, 6558-9))	21,992,500	—
Bond Discount and Finance Expense (Approximately $25 per $1000 or 2-1/2% (Tr. 830))	11,575,000	9,777,000
Interest (Six years' interest during construction amounting to $131,959,000 less interest earned during construction amounting to $45,422,000 (WPPSS Exh. 77 revised))	86,532,500	71,303,800*
TOTAL BOND ISSUE	$463,000,000	$391,080,000

* (Total interest of $111,457,800 less investment earnings of $37,154,800 and estimated net revenues from partial operation in 5th year in the amount of $3,000,000 (Tr. 10,691-3, 10,734-45).

mitted by WPPSS in its supplemental direct testimony (Tr. 1017 *et seq.*, WPPSS Exhs. 142-147). The proposed bond issue approximates 140 percent of the estimated construction cost of the project.

WPPSS' plan of financing does not cover tax costs allegedly because a realistic figure was not available (Tr. 6537). No studies were made, however, to determine or estimate tax costs (Tr. 6510, 6680); nor is any cost included for transmission to load centers or customers (Tr. 6509, 6534-5). These costs were estimated by WPPSS consultants R. W. Beck & Associates at an additional $138,000,000, with estimated annual costs of $9,346,752 (Tr. 840-2).

Any sound plan of financing must provide for the contingency that WPPSS might have to build its own transmission lines.[34] As stated by WPPSS witness McGill:

> . . . I have been advised by R. W. Beck and Associates that transmission facilities do not now exist that would enable Washington Public Power Supply System to transmit the power generated to potential users in southern Idaho, or in Washington, Oregon and northern Idaho. To accomplish the delivery of Nez Perce power to the points where potential users can take it, it was necessary to consider the possibility that, in the event the U. S. Government or others did not or, for some reason, could not build the necessary transmission lines, they might have to be built by the Washington Public Power Supply System (Tr. 840).

The original plan of financing contemplated the borrowing of six years' interest as protection against construction delays (Tr. 6560-1). The revised plan eliminates

[34] There is no evidence in this record, contrary to WPPSS' assertion (WPPSS br. p. 200) that these transmission lines will be built by BPA. Nor did any BPA official testify as to the "likelihood" of such construction.

capitalization of one year's interest or $21,992,500, and assumes accelerated construction plus net revenue of $3,000,000 by operating six units during the fifth year. The existence of net revenues also assumes that transmission lines have been built and the execution of "take or pay power" sales contracts at rates adequate to pay for all costs (Tr. 10,732-4, 10,745). The bond reserve fund at the beginning of construction is eliminated and deferred to the end of the fifth year by using the sixth years' interest (Tr. 10,732-3).

Other WPPSS revisions include using investment earnings to retire bonds instead of using such earnings to offset operating expenses, calculating interest earned during construction on a "cash flow" rather than an arithmetic average method, changes in the estimated construction schedule, power supply, engineering etc. (Tr. 6657, 6678, 6681).

These changes, and the assumptions on which they are based, make the revised plan less attractive to prospective lenders and more difficult of realization. The basic missing element, however, is the essential requirement for financial feasibility—an assured market. To carry out any financial plan, WPPSS must demonstrate the existence or probability of firm long-term power contracts for the output of Nez Perce at rates sufficient to meet all its costs. As pointed out by the Staff, WPPSS has no independent resources or credit (Staff br. p. 106). It does not now own or operate any electric generating facilities; it has no customers or loads. WPPSS' "assured market" is based on the anticipated general demand for electric energy in the Pacific Northwest, not on any contractual commitment entered into by specific customers (WPPSS br. p. 179).

WPPSS relies on power reservation agreements whereby each utility furnishing financial support (24 non-mem-

ber Public Utility Districts, municipalities and cooperatives in addition to its 14 member PUD's) has an option on a portion of the Nez Perce project output proportionate to the amount of its advances (WPPSS Exh. 107, PNPC Exhs. 51-54). While WPPSS is bound to sell should any of the 40 participants execute their options, they are not obligated to buy.[35] Nor is there any demonstration in this record that they will need Nez Perce power when it comes on the line.

The load growth of the public agencies that have signed options to purchase Nez Perce power is estimated by WPPSS to average about 65 megawatts of average annual energy per year during the seven-year period 1960-66, and about 60 megawatts per year during 1967-71 (WPPSS Exh. 112). In 1971, the total load of these public agencies is estimated at 1324 megawatts.

The record indicates that the public agencies, including all of the option signers, will have an assured supply of power from the Bonneville Administration until some time after 1970, and for an indefinite period in the future depending upon Bonneville's situation and their own generation (Tr. 4593). BPA states in its current load and resource forecast entitled "Power Outlook 1960-1970", dated October 1960: (Item E by Reference, Tr. 2697-9).

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> . . . On the basis of present load estimates and resource schedules Bonneville Power Administration can supply the energy requirements of the public agencies through 1970-71 under the most adverse streamflow conditions of record, and under these same conditions the indicated requirements of the private util-

[35] See "Agreement For Reservation of Certain Output of Nez Perce Project", par. 5, WPPSS Exh. 107.

ities in excess of their own resources can be served through 1963-64. However, if non-Federal hydro resources now under construction are used for the supply of utility loads these requirements of the private utilities can be supplied through 1964-65 (FPC Exh. 42, p. 1)

. . . . Public agency requirements are somewhat less than a year ago as a result of both slightly lower load estimates and an increase in their own resources. For example, the City of Takoma's Mayfield plant is now allocated to serve utility load and will reduce Tacoma's purchase of Federal power. Nevertheless, total public agency requirements on the Federal system will nearly double from 1,679,000 average kilowatts in 1960-61 to 3,137,000 average kilowatts in 1970-71. It is estimated these requirements will be served in full throughout the period of this Power Outlook. (p. 5)

In BPA's annual report for 1960 (p. 2) the statement is made that "for the first time in nearly 15 years, BPA finds it is in a period of surplus power instead of power scarcity." Clearly, Nez Perce will not be needed to meet the total loads of all the public agencies in the Pacific Northwest until some time after 1970, without reference to the growth in their own generation. WPPSS witnesses Hurd and Gallup testified that it will be necessary for the option signers to replace Bonneville power with Nez Perce power, and suggested that the option signers would be willing to pay for higher cost Nez Perce power to assure on ample power supply in the future (Tr. 20, 43, 45, 61, 85). It is unrealistic, and I find no basis in the record, to assume that the option signers would voluntarily give up priority BPA power costing approximately three mills to purchase Nez Perce power costing a minimum of 20 to 30 percent higher than the present

wholesale cost of BPA power (Tr. 4530, 4532). Nor is there any evidence in the record that the 40 option signers have the intention or the financial resources to take or pay for higher cost surplus Nez Perce power for an indefinite period until their load growth requires its utilization.

WPPSS policy witness Hurd conceded that "for a few years at least" there would be available power and energy in excess of requirements (Tr. 4406, 4320, 4321). He suggested that energy in excess of requirements (Tr. 4406, 4320, 4321). He suggested that industry and private utilities would pick up the slack.

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The major markets for this slack, as indicated by the Bonneville Power Outlook report, are the private utilities consisting primarily of the sponsoring companies making up PNPC, namely, the Montana Power Company, Pacific Power and Light Company, Portland General Electric Company, and the Washington Water Power Company.

As recognized by the Staff (Staff br. p. 66) the four sponsor companies will have a deficiency of 695 megawatts of average annual energy in 1966-67. Without High Mountain Sheep, they may be forced to build alternative high-cost thermal plants. BPA power is not a firm resource for the future since the four companies have been given notice that there is no assurance that BPA power will be available for them after 1963-64 (Tr. 2307-2308, PNPC Exh. 29). The public agencies have that assurance, plus increased generation from Priest Rapids, Wanapum, and Rocky Reach (Tr. 2301). Nor would the availability of Canadian storage significantly change the urgent need of the sponsor companies for additional firm hydro generation.

Realistically, therefore, the basic markets for Nez Perce or High Mountain Sheep power are the companies making

up PNPC. There is nothing in the record to indicate that these companies have any interest in purchasing this power from WPPSS, or that any other companies are presently willing to do so. As stated by PNPC witness Warren:

> While I would hesitate to hazard any guess as to the probable trends of prices in the decade from 1970 to 1980, I would point out that if a license is denied to us for High Mountain Sheep for immediate construction on the theory that our needs would be taken care of by juggling of power supplies just as I have described it, the result is to expose our customers to whatever hazard of price movements which may occur in a period of 20 years from this date which increases the capital costs of power supplies. We consider that our customers are entitled to have low cost hydroelectric power to serve their own needs. We will need the power by the time High Mountain Sheep can be built. WPPSS, its members and associates will not need any power before 1970, and probably not before 1975. (Tr. 10,575).

The result of this comparison is that Washington Public Power Supply System in 1970 will have approximately 14.2 percent of the total customers in the area and 14.4 percent of the resources. On the other hand, Pacific Northwest Power Company will have 41.4 percent of the total customers and only 21.5 percent of the resources.

Expressed in another way, the preference group as a whole and the Washington Public Power Supply System specifically are now assured that they will be able to serve their entire loads in 1970 through hydroelectric power, but the Pacific Northwest Power Company will have a substantial portion of its load that must be served from other sources of energy. This

> will be true even with a license for High Mountain Sheep granted by this Commission (Tr. 10,579, 10,580).
>
> The Nez Perce Project is entirely disproportionate to the needs [or] of ability of the Washington Public Power Supply System. It represents more than ten years' load growth for the Washington Public Power Supply System. The System, therefore, would require that other utilities undertake the financial responsibility of maintaining the availability of Nez Perce for the System until the System needed Nez Perce. Sound utility management would indicate that the System should undertake (as it has in the Packwood Project) projects commensurate with its needs (Tr. 10,581).

WPPSS obviously anticipates the sale of Nez Perce power to private utilities, even though these companies have made it clear that they are not willing to enter into any such commitments (WPPSS br. p. 185). The Staff agrees (br. p. 106) that WPPSS has not demonstrated that it is able to carry out its proposed plan of financing citing the absence of firm power contracts, assured market, and the failure to take into account transmission costs, taxes, or wheeling charges. It proposes, however, that WPPSS be given two years to obtain binding power contracts (presumably from the companies making up PNPC) and otherwise demonstrate its ability to finance the Nez Perce or the High Mountain Sheep Project.

Since the public agencies have first call on WPPSS power (whether generated at Nez Perce or High Mountain Sheep) the substitution of WPPSS for Bonneville[36] as a wholesaler

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[36] BPA 1960 annual report states (p. 16) that: "Increased non-Federal generation, most of which was transferred over the Bonneville Power Administration transmission system, resulted in reduction in BPA sales to privately owned utilities and to Cities of Seattle and Tacoma, Washington.

of power brings the PNPC group no closer to the solution of their basic problem—a long-term, firm

assurance of generation adequate for their own growing needs. The PNPC group are already committed to purchasing surplus non-Federal power from public agencies at Priest Rapids, Wanapum, and Rocky Reach.[37] I know of no public policy designed to encourage the shift or market from BPA to WPPSS, or to compel the private utilities to meet their increasing needs from non-federal public agencies on a short-term pullback basis.

WPPSS has failed to establish the existence of firm power contracts for the power output of Nez Perce or High Mountain Sheep. In lieu of firm contracts, WPPSS has listed its members, potential buyers, the results of market surveys, and ultimate regional needs. Its own financial witnesses, however, testified that prior to the issuance of its revenue bonds it would have to have under firm contract sufficient customers to cover all its costs. But even more basic is its failure to demonstrate an assured market for the power when it comes on the line in 1968. It may be some time after 1970, and probably not before 1975, before WPPSS and its members will need power above and beyond their own resources, plus federally generated power. Accordingly, WPPSS has demonstrated no real need for the output of Nez Perce or High Mountain Sheep within any reasonable, close period of time.

An assurred market is particularly essential to WPPSS since only the revenues from the proposed project itself are available to meet its financing costs. WPPSS has no

[37] The group's long-term purchase arrangements helped provide the financing for these projects licensed to Grant County and Chelan PUD's (Tr. 145).

other revenues or available source of funds, no take or pay contracts, to tide it over while it seeks to develop markets.

Nevertheless, the Staff suggests, citing the Commission's decision in the matter of *First Iowa Hydroelectric Cooperative*, 6 F.P.C. 227, 230,[38] that WPPSS be granted a hunting license for two years to round up the reluctant private utility and industrial customers that will be needed to demonstrate the existence of firm power sales contracts.

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The Commission's understandable desire in the First Iowa case not to prevent construction of a desirable project[39] obviously has little application to evaluating the comparative merits of financial plans presented by competing applicants. The issue here is which of the two applicants has made the more persuasive demonstration of financial feasibility for its proposed project. PNPC has established the existence of an assured market for the entire output of High Mountain Sheep on the part of its four organizing

[38] The Staff relies on the following language:

. . . Obviously, no independent concern such as the Cooperative could hope to obtain firm commitments on any proposed bond issue in advance of Commission authorization of a license. While we do not regard the mere license authorization to construct a water power project subject to Federal jurisdiction as being any guarantee of economic feasibility, it does not seem to be our function under the Act to prohibit construction of a desirable project which an applicant appears to be able to finance merely because complete financial arrangements have not been made, when as a matter of business practice such arrangements depend upon the license authorization initially. On the other hand, if only superficial showing of financial ability had been made by the applicant, or no financial house had indicated any interest, and it appeared that the license authorization was being sought merely for trading purposes, we would not be justified in authorizing a license no matter how desirable the development might be economically. In addition to these considerations, we note that the Cooperative and its predecessors have already reported large expenditures in furtherance of the development.

[39] A project, apparently, that was never constructed because the licensee could not make the necessary financial arrangements (PNCP reply br. p. 46).

companies. The organizing companies, with assets of $1,467,746,072,[40] agree to obligate themselves to take or pay for the entire output of the project at annual payments equal to total costs. PNPC's equity and first mortgage bonds will be readily saleable.

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WPPSS, on the contrary, relies on the potential regional need for the output of its proposed project. The Commission recently indicated, however, that the regional need[41] for hydro generation alone is not enough to justify a finding of financial feasibility where a competing applicant has demonstrated its own need for the power to be generated and the superior financial feasibility of its project.*

In the matter of *City of Seattle, Washington*, 26 F.P.C. 54 (July 10, 1961), the PUD had shown no firm commitments for the purchase of its Z-Canyon power; whereas the City of Seattle, the competing applicant, had established that it needed all the power to be produced by its Boundary Project. The Presiding Examiner found that the absence of power purchase commitments rendered PUD's showing of financial feasibility inadequate, and that this inadequacy

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[40] See 1961 stockholders' report (Form 2) on file with the Commission

PPL—	$663,247,000	
MPC—	280,667,638	
WWP—	265,783,857	
PGE—	258,047,577	$1,467,746,072

[41] Regional needs may be so pressing and so well established that it is unnecessary to determine the precise market befor issuing a license. This was the case in *Power Authority of the State of New York*, 12 F.P.C. 172, where demand was so great potential customers were seeking priorities for the applicant's output. That situation has no application to the present problem of choosing between competing applicants or to the facts in this case.

* Aff. Aug. 30, 1962 (C.A.D.C.) sub. nom. *PUD No. 1 of Pend Oreille County* v. *F.P.C.*

was not cured by adopting Seattle's need or the regional need for additional power in the Pacific Northwest. The Commission, in denying a Petition for Rehearing, stated in pertinent part:

> PUD contends that the Commission erred in concluding that Z Canyon is financially unfeasible because of lack of market for its power. The Examiner devoted eighteen pages of his decision to a showing of PUD's failure to prove the financial feasibility of its proposals. PUD has not demonstrated an existing and potential market for Z Canyon power and the record shows that such a demonstration is necessary before PUD could successfully negotiate its contemplated bond issue. (pp. 2, 3)

I conclude, therefore, that WPPSS has failed to establish its ability to finance the proposed Nez Perce or High Mountain Sheep projects. PNPC has demonstrated the financibility of its High Mountain Sheep project. Assuming, as Staff does, that WPPSS could, if given two years, come up with an acceptable plan of financing, PNPC's project is presently more attractive to lenders and offers a greater assurance of financial feasibility and early construction. No public interest or policy has been suggested for licensing WPPSS to wholesale power to the PNPC group, able and anxious to supply their own urgent needs, where the financial feasibility of the WPPSS project depends derivatively on the

needs of the competing applicants' organizing companies. On the contrary, it is, and has been the policy of the Commission to encourage public utilities under its jurisdiction to anticipate future loads and to expand to meet their own needs. See *City of Seattle, Washington*, cited *supra*, and

Pacific Power & Light Co. op. 354, issued April 17, 1962 (pp. 3, 7).

Fishery Resources, Facilities and Passage

Section 18 of the Federal Power Act, as amended, provides in substance that the Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such fishways as may be prescribed by the Secretary of the Interior. No recommendation of proposed facilities has been made by the Secretary of Interior for either project. However, the Department of Interior, in a letter dated November 21, 1960 (FPC Exh. No. 42) taking the position that "initiation of a project in the Middle Snake area is not requisite at this time", reports that advice may be transmitted at a later date—presumably after the Commission has decided which project, if any, to license. The Department's position was reaffirmed by Secretary Udall in a letter to the Chairman dated March 15, 1961, urging delay in licensing any Middle Snake project "pending completion of accelerated fish studies" (FPC Exh. 42B).

Finally, on June 28, 1962, the Secretary stated that "Our studies to date show little promise of a sudden major breakthrough which could produce a satisfactory solution to the fish problem at the Nez Perce site by the end of 1964." The Secretary recommended construction of High Mountain Sheep by the United States "Taking all resources into account, we believe that the Mountain Sheep Dam on the Snake River represents the optimum development."

Undoubtedly, as in other cases involving fishways, final design and approval of fishways and fish programs will be made after licensing but before construction is authorized. Both applicants concede the importance of the fishery re-

source and have submitted cost estimates for proposed fish facilities.

1. At the outset, it is necessary to evaluate the magnitude of the fishery resources which would be affected if either Nez Perce or High Mountain Sheep is constructed. We can then consider which of the competing plans is best adapted to permit the preservation and development of the fishery resource involved. The fishery resource at these projects includes spring and summer chinook salmon, fall chinook salmon, blue back salmon, and steelhead. According to the best available estimate,[42] approximately 264,200 adult salmonoids will present themselves

annually at the Nez Perce Dam site, more than one-third of the total [619,750] of the entire Columbia River anadromous fishery resource that passes McNary Dam. Of these, roughly 200,000, or 75 percent, enter the Salmon River for spawning, and the remaining 64,200, or approximately 25 percent, pass the High Mountain Sheep site. Of 152,700 spring-summer chinook passing the Nez Perce site, 136,000 will enter the Salmon River, while the remainder of 16,700, or 10.9 percent, will proceed up the Snake River past the High Mountain Sheep site. Of 35,000 fall chinook passing Nez Perce, 5,000 will proceed up the Salmon River while the remainder of 30,000, or 85.7 percent will proceed up the Snake River past the High Mountain Sheep site. Of 9,000 blue-back passing Nez Perce, all will enter the Salmon River, and of 67,500 steelhead at Nez Perce, 50,000 will enter the Salmon, while the remainder of 17,500 or

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[42] A three-year study conducted by the Idaho Fish and Game Department and the Oregon Fish Commission for the U. S. Corps of Engineers (Fisheries Exh. 6, Tr. 8987-91) representing maximum counts arrived at by statistical methods.

25.9 percent, will proceed up the Snake past the High Mountain Sheep site.

This estimate indicates, and I find, that the greater portion of the sports and commercial fishery resources involved in these proceedings is to be found in the Salmon River. "The Salmon River is by far the most important fish producing tributary in the entire Columbia River Basin" (FPC Exh. 42 letter from Secretary of Interior to Chairman, FPC dated 11-21-60, p. 4).

It has been estimated that over $200,000,000 has already been invested in fish preservation facilities on the Columbia River.[43] The cost of fish facilities at eight federal dams on the main stem of the Columbia River alone has been estimated at $156,000,000. The cost of such facilities at Priest Rapids will be about $10,000,000, and at Rocky Reach about $9,000,000. This does not include the proposed cost of fish facilities at Nez Perce (31-43 million) or High Mountain Sheep (11-15 million), or costs of operating and maintaining the facilities and costs of research. The commercial catch of the Columbia River is estimated to be worth around $12,000,000 annually (CRSTPA Exh. 4), and the sport fishery attributable to the Salmon River alone as much as $8,000,000 (Tr. 978). While WPPSS does not consider the fish count estimates presented as reliable, it does concede significant monetary, cultural, aesthetic, and recreational value to the commercial and sport fishery attributable to the spawning areas above the proposed projects.

In any event, it is established federal policy to maintain the Columbia River fishery resource (including the Salmon and Snake River contribution) and to pay a high price, if necessary, to insure salmon

[43] Salmon of the Pacific Northwest—Anthony Netboy (1958) pp. 111, 112.

preservation. This does not mean that the Commission will, or should, refuse a license solely because a proposed project may be detrimental to the conservation of migratory fish. As the Chairman recently observed, "We cannot allow the fish problem to paralyze the Commission in acting on hydroelectric license applications." (Address before the American Public Power Association, San Juan, Puerto Rico, May 15, 1962). The fundamental standard is "The public interest." See *F.P.C.* v. *Sierra Pacific Power Co.* 350 U.S. 348, 355. The harmful effect of a proposed project on the conservation of anadromous fish is only one—however important—of various public interest factors which must be considered in determining which plan is best adapted to water resource development for power, navigation and flood control, as well as fish maintenance. *In the Matter of City of Takoma,* 10 F.P.C. 424 (1951). The goal is optimum use of the river under a plan which permits maximum development of all water resources, including power and fish, involved in comprehensive river development. Fish are not "the sole controlling resource" (WPPSS reply br. p. X-7). If that goal cannot be achieved, the Commission must balance any adverse effects of the proposed projects on fish against the overall benefits to power, flood control, navigation, and other beneficial water uses.

2.

a. *WPPSS Upstream Fish Facilities at Nez Perce*

The upstream fish passage facilities proposed by WPPSS for the Nez Perce project include a picketed lead barrier downstream across the power plant discharges. The barrier is angled downstream across the river and designed to to move migrants towards the right bank to the area of the fishway entrance, thus preventing the fish from ap-

proaching the powerhouse tailrace tunnels, or from being trapped at the base of the dam. The applicants' joint statement agrees that a picketed barrier of the type proposed can be physically erected and maintained in the river. However, it does not agree that such picketed barrier would function for the purpose intended, or that the cost estimate is adequate.

Two slotted entrances are provided into a 16-foot wide fish ladder having its low-water entrance at elevation 874. The ladder extends into a tunnel in the left bank up to the fish locks at elevation 1147, maximum climb in one-foot steps of 273 feet.

There are two pressure lock chambers at the head of the ladder where the fish will be subjected gradually to water pressures equal to those existing at the same elevation in the reservoir. The fish are then

expected to leave the lock and enter the reservoir guided by attraction flows through the turbin intakes and further induced by means of a brail sweep located in the lock chamber.

After the fish have presumably swum through the reservoir, they will pass through upstream migrant fish ladder facilities provided at the Whitebird fish barrier on the Salmon River, or a similar facility at the head water of the Nez Perce reservoir on the Imnaha River. The Whitebird ladder is 16 feet wide, whereas the Imnaha ladder is 10 feet wide (WPPSS Exhs. 155 and 156). Both have a slope of one on ten.

b. *WPPSS Downstream Facilities at Nez Perce*

The most important features of the Nez Perce downstream fish passage facilities are the louver by-pass instal-

lations proposed at both the Whitebird barrier on the Salmon River and the Imnaha barrier on the Imnaha River at the head of the Nez Perce reservoir. At these barriers the fingerlings which have been spawned upstream will be screened, sorted, and gathered for barging to the Nez Perce dam. The louver structure (WPPSS Exhs. 155 and 157) is made up of closely spaced vertical metal bars arranged in the form of a "V" with the opened end at the upstream of the structure. At the apex of the "V" there is a full depth of vertical slot that connects with a by-pass pipe. The fish are directed to the by-pass slot, which they presumably enter with the flow of water, where they are carried to a second screening device, the secondary louver, in which louvers are again employed to divert the fish from the bulk of the flowing water with which they enter the structure. The fish are then graded and passed to holding tanks at loading areas for transportation to Nez Perce dam by barge.

A floating skimmer device is also provided in the forebay of the dam to collect those fingerlings that have entered the reservoir forebay, and collect them for passage through the dam in a vertical chute and flume where they will be discharged into the Snake River downstream to the picketed lead barrier structure at elevation 920 (WPPSS Exhs. 151, 152, and 153).

c. *WPPSS Fish Facilities at High Mountain Sheep*

The fish passage facilities proposed by WPPSS for the High Mountain Sheep project are basically the same as those proposed for Nez Perce except for changes necessitated by the fact that a conventional powerhouse is proposed for High Mountain Sheep, and an underground powerhouse is proposed at Nez Perce (WPPSS Exhs. 313-320). The upstream facilities proposed by WPPSS at the High Mountain Sheep dam include a standard

attraction and powerhouse upstream collection system, a fish ladder extending from the powerhouse along the downstream face of the dam to the area of the power intakes, and two pressure fishlocks extending through the dam and discharging at elevation 1152 (WPPSS Exhs. 314, 316). Downstream migrant facilities include a louver at the Imnaha barrier for transfer of downstream migrants by tank to the High Mountain Sheep dam. At the dam itself, a downstream migrant floating skimmer and unloading facilities will be located where the fish will be transported through a helical chute and exit flume and discharged downstream into the Snake River (WPPSS Exhs. 317 and 318). An upstream migrant fish ladder is located at the Imnaha fish barrier.

3. *PNPC Fish Facilities at High Mountain Sheep*

Upstream migrant facilities for Snake River fish at High Mountain Sheep dam include an attraction, collection, and transportation system at the powerhouse (PNPC Exh. 65); two fish ladders, one extending to the Imnaha Canal for a height of about 585 feet and the other from the powerhouse collection system to the tramway structure at elevation 955 (PNPC Exh. 66). The fish are carried in hoppers over the dam and into the reservoir.

Upstream facilities for Imnaha fish include a ladder entrance discharging Imnaha River water, a fish ladder 6000 feet long, and a 17-mile canal extending to the pool of the Imnaha fish barrier. A fish ladder is also located at the Imnaha fish barrier to permit fish to ascend the Imnaha from the reservoir itself.

Downstream Snake River migrants will be delivered at the proposed Hells Canyon loading station for transfer to barge or boat and released below the High Mountain Sheep

dam. Downstream Imnaha migrants will be diverted at the Imnaha fish barrier by a concrete gated dam, screening and trashrack structure, and by-passed into the canal to be discharged below the dam (PNPC Exhs. 66 and 67).

Lower Canyon

Lower Canyon, whether located on the Salmon at mile .5 or mile 3.7, poses fish passage problems similar to Nez Perce. No license application is pending for this site and no one is proposing development with specifically designed fish facilities. The Staff points out, and I agree, that the Lower Canyon reservoir presents simpler passage problems than Nez Perce since it does not have multiple runs of Salmon, Snake, and Imnaha fish, multiple tributaries, reverse flows, and the problems associated with these additional obstacles to successful migration (Staff br. p. 192).

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4.

a. *Discussion of Fish Passage Facilities and Problems*

The reservoirs that will be formed behind the proposed Nez Perce and High Mountain Sheep dams constitute a major hazard to migrating fish. The Nez Perce reservoir will extend up the Snake River 61 miles to the tailwater of the Low Hells Canyon dam, 63 miles up the Salmon to the Whitebird fish barrier, and 10 miles up the Imnaha to the Imnaha fish barrier. All upstream migrants must pass through the reservoirs to reach up-river spawning beds above the proposed dams. Migratory salmon are basically river fish, and large reservoirs of the size and depth proposed change their natural environment with complex and adverse biological consequences. The change from the river to large and deep reservoirs produces changes in temperature, velocities of flow, stratification, oxygen content, and migratory patterns. There is substantial testi-

mony that these changes will seriously impede maintenance of the fishery resource.

During the winter season, the reservoirs will be relatively homogeneous with no regular variation in temperature or stratification either vertically or along the length of the reservoir. In the spring the temperature of the surface layers will begin to increase, as will the temperature of the inflowing waters, but at a less rapid rate. The inflowing volume will sink below the reservoir surface seeking its own density level at some intermediate depth. As the water warms through the summer, vertical stratification will strengthen, reaching maximum intensity in August when the temperature difference approaches 40° F (PNPC Exh. 100). Temperature differentials affect fish migration and mortality.

WPPSS proposes to exit adult migrants into the Nez Perce reservoir at elevation 1147, 363 feet below the normal water surface (1510) in the vicinity of the turbine intakes. The power intake at Nez Perce is at elevation 1110 feet, or 400 feet below the normal water surface.

Dr. Pritchard, a PNPC witness, testified that the deeper layers in all thermally-stratified reservoirs exhibited oxygen deficiency during the period of thermal stratification. He testified that the dissolved oxygen content of the waters between 250 and 350 feet would begin to decrease in March to less than four parts per million in July and less than three parts per million in August and September. Wendell Smith, a fisheries biologist, testified that the Washington State Pollution Commission uses a standard or five parts per million, "below which salmon are believed to be in jeopardy" (Tr. 14,087).

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Another hazard present in these reservoirs is "Residualism"—the failure of downstream migrants to pass

through the reservoir to the ocean. Ralph W. Larson, a fisheries biologist employed by the Washington State Department of Game, testified that the normal pattern for a downstream migrant is to move downstream with the current at river speed, its head facing the current, its tail pointed downstream (Tr. 1399). Large reservoirs with deep currents and low velocities increase the time spent in the reservoir—a critical factor. The fish may decide not to leave. They are then lost forever as perpetuators of the anadromous species, since residual fish do not spawn successfully (Tr. 1400, 1458).

Forrest Hauck, fisheries biologist for the Idaho Department of Fish and Game, testified that five times the amount of residualism on the average might be expected in the Nez Perce pool as would be found in the High Mountain Sheep pool based upon the numbers of fish affected (Tr. 1458-9). He indicated that temperature, timing and water quality all may contribute to residualism. Seward bound salmon and steelhead undergo a change in physiological functions in which they become adjusted to saline waters. Dissolved salts in the reservoir may be adequate in amount to satisfy their migratory instinct and induce residualism. Evaluation studies are underway at Brownlee to show the effect of the reservoir on residualism and related factors (Tr. 9108, 9282-3).

The applicants are agreed that the in-reservoir conditions of velocity, temperature, stratification, and oxygen content will be substantially the same in the Nez Perce and High Mountain Sheep reservoirs. However, Nez Perce, in addition to affecting the greater fishery resource of the Salmon River (unaffected by High Mountain Sheep) presents reservoir passage problems of much greater complexity and under conditions substantially more adverse than those presented at High Mountain Sheep reservoir. At

Nez Perce, upstream Salmon, Snake, and Imnaha River migrants will be discharged 363 feet below the surface of the reservoir in the vincinity of the power intakes under pressures of 145 pounds psi. The effect of this pressure on the fish, at depths below their normal migration level in fresh water in an area where oxygen deficiencies may prevail, is unknown.

Hauck suggested that the failure of migration at Brownlee was due to the changes in environment from river to reservoir—current conditions, stratification, temperature changes, oxygen deficiencies, salt content and other ecological factors. At Nez Perce, three different runs of fish, Salmon, Snake, and Imnaha, will have to find their way through the reservoir to the appropriate natal stream and their respective spawning grounds. The Chinook migration season coincides with the period of

thermal stratification with multiple vertical layers of Snake and Salmon River water extending up both the Snake, Salmon, and Imnaha arms of the reservoir. These reverse flows, with Snake River water in the Salmon arm and Salmon water in the Snake arm, may confuse the fish and lead them away from their natal stream (8171-8179, 11,138). Water quality problems are minimized at High Mountain Sheep which leaves open the migratory route of the major salmon runs.

WPPSS's facilities are designed to exclude downstream Salmon River migrants from entering the reservoir by means of a louver barrier at Whitebird. Small louver type fish diverters are in use at various installations—the largest at Tracy in an irrigation canal with a capacity of 5000 cfs. The percentage of salmon passing down the river that are successfully diverted into the by-pass by these louvers ranges between 13.4 and 80 percent (Tr. 1433).

The proposed Whitebird installation dwarfs existing louvers and is considered experimental by the fishery agencies. It would handle variable flows from 2500 cfs to a maximum of 120,000 cfs, or up to 24 times as much water in volume as Tracy. Each louver bay will be 60 feet deep—a depth at which turbidity would have the greatest effect on visual reaction. The Staff concludes that many problems remain to be solved before the louver barrier can be adapted for use at Whitebird, including turbulence, control of velocity of approach, icing conditions, trash accumulation and removal, and handling of stream flows up to 120,000 cfs (Staff br. p. 119).

WPPSS' proposed floating skimmer some 60 miles downstream in the forebay of the Nez Perce reservoir is similar to the skimmer at Brownlee and is designed to attract downstream migrants that evade the louver system. The fishery agencies consider the Brownlee skimmer a failure (Tr. 1411, 1444, 8228) and attach little value to the proposed Nez Perce skimmer.

The fishery agencies also object to WPPSS' pressure locks, an essential part of the upstream passage facilities, on the ground that it has never operated successfully at any dam and has too many untested mechanical features. The Staff emphasizes uncertainties in the operation of the fish lock, including its mechanical features, the effects of pressure on adult salmon and steelhead (Tr. 8854, 8484), the possibility of impingement of fish on trashracks after release from the lock (Tr. 8959), existing of fish from the lock (Tr. 8407), and the actual capacity of the lock (Tr. 8483).

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WPPSS offers to subject all aspects of its proposed fish facilities to intensive study, experimentation, and pre-construction testing. This would include the response of adult

fish to pressures encountered in the proposed lock chambers, the sufficiency of the oxygen content in the Nez Perce reservoir, the louver barrier, etc. If these tests should prove the facilities inadequate, WPPSS contends that alternatives are available.

Definitive tests, however, cannot be made and evaluated until after the Nez Perce dam is constructed and it will then be too late to make changes without great risk to the fishery resource and greater project costs. The suggested WPPSS alternatives—trapping and hauling of upstream migrants past the dam, aeration at the turbines, a full height fish ladder, transporting the adults by barge through the reservoir, and the relocation of the Snake and Imnaha runs to the headwaters of the Salmon—offer no greater promise of sustaining the runs than WPPSS' primary proposals. The increase in mechanical handling and the confinement of the fish during transportation will increase disease problems and mortalities. The break in the continuity of water quality and the migration route of the juvenile fish and the returning adults introduces elements that have not been tested or evaluated and are deemed unsatisfactory by the fishery agencies (Fish Agency br. p. 20, Fish br. 8-11). Relocation of the Snake and Imnaha runs to the headwaters of the Salmon may in fact mean abandonment of all the Snake River runs above the mouth of the Salmon. Edward M. Mains, fisheries biologists, testified for the Washington State Department of Fisheries that, while fall chinook have been raised by artificial spawning channels, fish farms and hatcheries, results with regard to spring and summer chinook—the major Salmon River fishery resource—have not been satisfactory (Tr. 1372-1373). Accordingly, artificial spawning does not appear likely to alleviate the adverse effects of blocking the Salmon River insofar as the evidence of record is concerned.

WPPSS emphasize the accelerated research program of the Department of Interior announced in the Secretary's letter to the Chairman, March 15, 1961 (FPC Exh. 42B). Secretary Udall stated in part:

> We have set the end of 1964 as the target date by which time to learn as much as possible the direction in which a sound development program should go.

The letter urges no license to any applicant

. . . pending completion of the accelerated fish studies . . .

and states

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> . . . In discussions with our fish biologists, we have concluded that a solution to the problem of downstream fish passage has not yet been found either for the proposed High Mountain Sheep Project nor the proposed Nez Perce Project.

An earlier Department of Interior letter dated November 21, 1960, stated in pertinent part

> . . . There are at present no known means for protecting the fishery resources of the Salmon River if either the Lower Canyon or Nez Perce Project were constructed (FPC Exh. 42).

The fishery interveners support experimentation but urge that it be kept above the mouth of the Salmon. As stated by the Idaho Wildlife Federation

> To continue experimentation to solve anadromous fish passage problems at high dams with large long reservoirs is important, and the Snake River with its three Idaho Power Company licenses already above the mouth of the Salmon is the place this should be

done. The failure of successful fish passage at Brownlee is supplying now some of the negative answers from experimentation. To keep the experiments above the mouth of the Salmon for many years is paramount, and that is why the High Mountain Sheep Project of the Pacific Northwest Power Company is the proper development for the middle Snake (Br. of the Idaho Wildlife Federation, pp. 4-5).

Licensing policy must be based on evidence currently available and capable of evaluation. The Department of Interior holds out no promise or expectation that its "accelerated fish studies" will be successful at the end of 1964, or by any other date; nor has any other fishery agency,[44] local, state or federal. None of the ten fishery biologists that appeared in this proceeding [including WPPSS biologist Dr. Holmes] testified[45] that the proposed Nez Perce fish facilities,

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which from an engineering point of view are designed with great boldness, technical skill, and imagination, would suc-

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[44] Extracts from their testimony are contained in PNCP's brief p. 67 *et seq.*

[45] The fishery agencies comment on the research program as follows:

There is no question in anyone's mind that the passage of fish at high dams has not been solved. Congress has recently appropriated funds in the amount of several million dollars for the initiation of research to attempt to solve the problems related to fish passage at high dams. "The *research program has been outlined to cover the next seven or eight years with a critical review of the findings at the end of 1964 to determine what steps might be taken in the comprehensive development projects in the Northwest at that time.* Both Nez Perce and High Mountain Sheep are high dams. Both applicants offer features in their fish passage facilities which are experimental in nature. In other words, these particular features of fish passage at high dams have not been worked out or evaluated at high dams anywhere in the world. (emphasis supplied).

cessfully pass and preserve the existing runs. Achievement of successful passage is a biological as well as an engineering problem. Biologists simply do not now know what conditions must be created to provide successful fish passage through large and deep reservoirs and around high dams. As summarized by the fishery agencies:

> The proposed fish passage plan of WPPSS is based upon a combination of untried, untested, unsatisfactory and controversial elements, piling risk upon risk to the extent that no biologist, including that of WPPSS will predict that it will work (Br. p. 22).

The High Mountain Sheep dam above the mouth of the Salmon, however, creates new problems only with regard to the minor fishery resources [less than 6 percent] of the Imnaha. Upstream the main Snake River run is already jeopardized by Brownlee, Oxbow, and, soon, the Hells Canyon dam.

In its most recent report to the Secretary of the Army dated March 31, 1961, the Corps of Engineers evaluates the possible impact of fishery research on Nez Perce as follows: (p. 8)

> However, the problem of passing migratory fish at high dams, in the opinion of authoritative sources, cannot be resolved in less than 8 to 10 years, and, because of the unique fisheries problem presented, they state that at least 15 to 20 years might be necessary to resolve the problem that would be created by the Nez Perce project . . .

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The High Mountain Sheep project could be constructed now without being a serious hazard to the anadromous fishery, since it would affect less than 3

percent of the fish passing McNary Dam in addition to that already affected by existing projects on the Middle Snake River.

The current position of the Department of Interior on the prospects for successfully passing fish at the Nez Perce site is contained in the Secretary's letter of June 28, 1962 (Exh. 43-A) requesting that the Commission recommend Federal construction of the High Mountain Sheep Dam.

2. The fishery resources are vitally involved. The Fish and Wildlife Service of this Department is studying intensively the passage of fish, both upstream and downstream, over large structures and through long storage reservoirs. *Our studies to date show little promise of a sudden major breakthrough which "could produce a satisfactory solution to the fish problem at the Nez Perce site by the end of 1964,"* which was the tentative date for completion of the accelerated research program. *A calculated risk that by that time, or within a few years thereafter, Nez Perce could be accommodated to the anadromous fish runs representing 75 percent of the anadromous fish resources of the Snake River basin would not be warranted on the basis of what these studies are showing The Mountain Sheep project represents less hazard to the fishery resource than the Nez Perce project.* We hope the research program will develop effective means for fish passage which can be incorporated into new and existing projects, including the Mountain Sheep project. Additional study and research during the operation of a middle Snake River project may disclose improvements which can and should be made to protect still further the fish runs. Construction and operation of the project by the United States will assure that every effort will be made promptly to preserve and improve

this important fishery resource in the light of experience and changing technology. The flexibility and relative ease with which facilities for effective fish passage could be incorporated in a mutiple-purpose Federal project should be compared with the difficulties that would be encountered in a project constructed and operated by a non-Federal entity. Particularly acute problems involving extensive readjustments for additional costs would be certain to arise. (emphasis supplied)

Finally, WPPSS adverts to the Commission's comments in its 1958 decision to the effect that "the biological problem at Nez Perce is generally similar to that at other high dams." (*Matter of Pacific Northwest Power Co.*, cited *supra*, p. 135). The "promising outlook" at Brownlee has not materialized and the record in this proceeding does not support an optimistic outlook for the success of the proposed Nez Perce fish passage facilities. The Staff concludes, (Staff br. p. 193) "This record no longer justifies that conclusion", referring to its belief in the earlier proceeding that "there was some basis for believing that the problem could be solved with a reasonable degree of success."

The Rival Plans of Development

Section 10(a) of the Federal Power Act provides in pertinent part that all licenses issued shall be subject to the following conditions:

> That the project adopted . . . shall be such that in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement

and utilization of water-power development, and for other beneficial uses, including recreational purposes; . . .

A comprehensive plan provides for prompt and optimum multipurpose development of the water resource.[46] The proposed project to be licensed must be "best adapted" to achieve such development.

Both plans develop all the available head, and both are comprehensive in that they provide for all practical uses of the river.[47]

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The High Mountain Sheep project is the major component of PNPC's plan of development and the Nez Perce project is the major component of WPPSS' plan. Their relative merits turn on a comparison of the costs and benefits of component developments and on which project is best adapted to attain optimum development at the earliest time with the smallest sacrifice of natural values.[48]

The Commission must consider the component developments and plans not only from the point of view of power costs and benefits but also flood control, navigation, irriga-

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[46] The Federal Power Act looks to prompt development of water resources where such development is feasible and in the public interest, and it gives to the Commission discretionary power to delay utilization only where such delay is found to be imperative. (*In the Matter of Virginia Electric Power Company*, 10 FPC 1)

[47] The "common reach" includes the Snake River from the Low Hells Canyon normal pool elevation of 1683 to the China Gardens elevation of 845, and the Solomon and Snake Rivers from the Freedom normal pool elevation of 1.780 to the China Gardens tailwater elevation (Prehearing conf. Report p. 5).

[48] When there is a choice to be made among several development plans, the plan which achieves greatest utilization of the water at the earliest time, thus serving the people to the greatest extent, is the plan given prime attention. (Grand River Dam Authority, project No. 2183, 25 FPC 646, (1961)).

tion, recreation, fish and wildlife, and "other beneficial public uses" as that phrase is employed in Section 10(a). Accordingly, we proceed to an analysis of the rival plans and their component projects to determine which will more readily achieve prompt and optimum development of the resources involved. It should be noted that, other than the competing projects proposed for licensing, neither applicant is proposing the construction of any other projects or developments in either plan. The superiority or inferiority, however, of alternative plans of development does not depend on the pendency of applications to construct all of the component projects. The Commission has the power, once it adopts a particular plan, to require an applicant to conform his proposed project to the Commission's plan of development even though it may mean changing sites, locations, structures, capacity, or timing.

PNPC's High Mountain Sheep plan includes an arch dam at High Mountain Sheep, Snake River mile 189.2, elevation 1510, with an initial installation of seven units (1,400,000 kw) and an ultimate installation of ten units (maximum capability—2,000,000 kw). An arch dam is included at Lower Canyon Salmon River, elevation 1595, mile 3.7 with an initial installation of four units (800,000 kw) and an ultimate installation of seven units (1,400,000 kw) in a single powerhouse. The China Gardens site is a gravity dam, elevation 945, with an initial installation of three units (300,000 kw), an ultimate installation of five units (500,000 kw) at normal pool elevation of 945.

PNPC's Nez Perce plan includes a gravity dam at the Nez Perce site with an initial installation in two powerhouses of eleven units (2,090,000 kw) an ultimate installation of seventeen units (3,230,000 kw) (PNPC Exhs. 16 and 19). The Whitebird development is omitted from PNPC's plans as uneconomic. While PNPC's plan de-

velops all the available head, its Nez Perce plan has a smaller capability both initially and ultimately,[49] because of more efficient use of storage in its High Mountain Sheep plan.

WPPSS' Nez Perce plan includes the Nez Perce project as proposed in its amended license application, a Whitebird project consisting of three generating units, rated 23,000 kva, each installed in a skeleton powerhouse built as part of the Whitebird fish barrier dam, and the China Gardens project, as explained in the testimony of WPPSS' witness Willey, based on Corps of Engineers estimates (Tr. 489, WPPSS Exh. 271).

WPPSS' High Mountain Sheep development is identical with the project for which WPPSS has alternatively applied for a license except that the flood discharge capacity has been reduced (Tr. 106). Its Lower Canyon development consists of a rock fill dam about 700 feet high located at mile 0.5 on the Salmon (Tr. 12,932).

The Staff originally presented comparative plans similar to PNPC's plans, except that the Whitebird development was considered in its Nez Perce plan. On rebuttal, however, the Staff plans were similar to those presented by WPPSS with certain adjustments, including an arch dam layout at Lower Canyon mile 3.7, at elevation 1588 (Tr. 13,589). The Staff's High Mountain Sheep plan is designated as Plan A-1 and its Nez Perce plan as B-1.[50]

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[49] PNPC Exh. 16

	Initial	Ultimate
High Mountain Sheep Plan	2,500,000 kw	3,900,000 kw
Nez Perce Plan (without Whitebird)	2,315,000 kw	3,605,000 kw

[50] Detailed data for developments of PNPC's and WPPSS' comparative plans are shown in Tables of Physical Data, Projects of Alternative Plans, Joint Exhibit, Part G. Project physical data for Staff plans are shown in FPC Exhibit 61.

Construction Costs

Cost estimates for all projects in the common reach were presented by PNPC, WPPSS, the Staff, and the Department of Conservation, State of Washington.[51] WPPSS presented completely revised designs and cost estimates in its supplemental and rebuttal presentations, except for China Gardens. In addition, WPPSS witness Bleifuss submitted three revised designs for Nez Perce (WPPSS Exhs. 275-281), two for Lower Canyon, (WPPSS Exhs. 283-284) and two for Whitebird (WPPSS Exhs. 285 and 286). Each modification in design produced a different cost estimate. The record contains cost estimates from six different sources—the Corps of Engineers, obtained from the 1958 Division Engineer report, Ebasco, Harza, Bleifuss, Thomas, and Staff. For the Nez Perce development alone there are fourteen different estimates[52] in the record ranging from $288,709,000 in WPPSS Exh. 278 to $403,400,000 in WPPSS' original presentation in Exh. 19-A. These differences in cost are due to different overall project layouts —reservoir elevations, installed capacity, geological analysis, foundation lines, length of spillways, powerhouse locations, powerhouse designs, and major items of equipment (Joint Statement, Designs and Costs, Part H).

PNPC comparative analysis using its Green Book design (PNPC Exh. 16) shows construction costs of the alternative plans as $368,600,000 for High Mountain Sheep plan and $397,000,000 for the Nez Perce plan, including Whitebird. Without Whitebird, the cost drops to

[51] PNPC Exhs. 16, 19; WPPSS Exh. 20-A; Department of Conservation DCW Exh. 7; FPC Exhs. 17, 32, 80, and 83.

[52] Staff points out that these costs are not comparable "since some include fish facilities, some do not, some include interest during construction, some do not" (Staff br. p. 172).

$361,000,000. If as recommended by Staff in its direct case (FPC Exhs. 44 and 57), an Ebasco type arch dam is substituted for the gravity design at Nez Perce, the Nez Perce plan costs $390,600,000 with Whitebird and $354,600,000 without.

This demonstrates, asserts PNPC, that for the initial[53] period the High Mountain Sheep plan would have 177,000 kw more nominal prime,

74,000 kw more average energy generation, and 147,000 kw more peaking capability (Applicants' Joint Statement, Part I, Table 2).

> The High Mountain Sheep Plan would have an annual power value of $57,436,000—$3,973,000 more than the Nez Perce Plan (Applicants' Joint Statement, Part J). Under the subsequent period, without Crevice storage, the High Mountain Sheep Plan has a superiority of 85,000 kilowatts of nominal prime energy, 64,000 kilowatts of average annual energy and 139,000 kilowatts of peaking capability (Applicants' Joint Statement, Part I, Table 5) and would have an annual power value of $49,644,000—$2,640,000 more than the Nez Perce Plan (Applicants' Joint Statement, Part J). The High Mountain Sheep Plan of Development also provides greater flood control benefits than would the Nez Perce Plan of Development, approximately $50,000 annually (PNPC Exh. 19, page 6). (PNPC br. p. 7).

Consequently, argues PNPC, the additional benefits of the High Mountain Sheep plan over the Nez Perce plan justify an additional capital investment of $68,000,000.

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[53] *Initial Period*—System power development of approximately 16,000,000 kw assumed prevailing when either High Mountain Sheep or Nez Perce comes into service (See Joint Statement, Part I).

WPPSS argues that you can build one dam (Nez Perce) cheaper than two dams (High Mountain Sheep and Lower Canyon) and that PNPC understates the cost of the High Mountain Sheep plan and overstates the cost of the Nez Perce plan (WPPSS br. p. 85 *et seq.*) (Tr. 12,807, WPPSS Exh. 254). It disputes PNPC's use of a gravity dam design at Nez Perce and its assumed foundation lines at High Mountain Sheep and Lower Canyon. It refers to comparisons by WPPSS witness Bleifuss and the Corps of Engineers. In Bleifuss' "Truest Comparison" (WPPSS Exh. 290), the Nez Perce plan is cheaper than the High Mountain Sheep plan by $50,174,000 ($312,693,000 vs. $362,867,000) (WPPSS br. p. 115). The latest report of the Chief of Engineers, March 31, 1961, comments as follows: (p. 8)

> The water resource potential of the lower Middle Snake Basin can also be realized through construction of the High Mountain Sheep Dam on the Snake River and the Lower Canyon Dam on the Salmon River. This combination will produce greater benefits than the Nez Perce project but at a greater cost and a lower justification ratio. Since the preparation of the Division Engineer's report, the results of additional investigations at the High Mountain Sheep and Lower Canyon sites have become available, which indicate rather conclusively that a concrete arch dam is feasible at the High Mountain Sheep site. This dam, built to provide a full pool at elevation 1510, would cost roughly $44 million less than the

> concrete gravity section dam proposed by the Division Engineer, but raised to the same elevation ($198 million vs. $242 million). There is some chance that an arch dam also might be substituted for the more

expensive rock fill dam at the Lower Canyon site but a conclusion cannot be reached until further borings are made. This additional study can wait until the advance engineering and design stage immediately prior to initiating construction. Even with the reduced cost of High Mountain Sheep Dam, the combination of that dam with Lower Canyon Dam would still cost more than Nez Perce Dam ($384 million vs. $296 million, with the Snake River reservoirs at elevation 1510). The combination also would have a lower justification ratio than Nez Perce (2.23 to 1 vs. 2.91 to 1) if we assume that either of the two alternative developments would be built in the near future.

WPPSS concludes that while the two plans, when completed develop substantially the same power and flood control benefits a truly comparative study of capital costs shows a differential of $90,000,000 to $93,000,000 in favor of the Nez Perce plan of development. "The single most serious mistake is the assumption that an arch dam can be constructed at the mile 3.7 Lower Canyon site, which is geologically impossible for this purpose" (WPPSS br. p. 147).

Comparison of the alternative plans of development is of little value unless comparable and consistent project layouts, designs, cost estimates, and installations are utilized. Each applicant's estimates favor its own plan of which its proposed project is a major part. In large part this results from the selection of the most expensive site and layout for the opponent's projects. WPPSS' use of a rock fill dam at mile 0.5 adds about $49,000,000 to the cost of High Mountain Sheep plan.

Staff witness Shepley testified that his final quantity estimates were based on the consistent use of the inde-

pendent elastic arch method so that a truly comparative economic study of the two plans could be made. The arch dam is the most economic design. Its consistent use in both plans facilitates a genuinely comparative analysis and comparison of the quantities of construction materials (Tr. 7255, 7274, 7275, 13,569).

The Staff use of an arch dam at the High Mountain Sheep, Nez Perce, and Lower Canyon (mile 3.7) sites for the purpose of making a comparative analysis of the rival plans is reasonable and proper. If an arch dam is used at Nez Perce, the use of an arch at Lower Canyon mile 3.5 is equally justified on the basis of the geologic evidence in this record to determine the relative economic merits of the two plans.

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The Staff used two different project layouts for its comparative analysis. Comparison I used a Harza design and located all power plants across the river (FPC Exhs. 64-66). Comparison II, the more economic design, located the power plants on the banks parallel to the river (FPC Exhs. 67-69). The amount of concrete and excavation from Staff project layouts for Nez Perce was 66 percent and 43 percent, respectively, of the total for High Mountain Sheep and Lower Canyon.[54]

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[54] (Staff br. p. 169)

Cubic Yards

	Nez Perce Plan	High Mountain Sheep Plan			Nez Perce / HMS L. C.
	Nez Perce	High Mt. Sheep	Lower Canyon	Total	
Dam Concrete	2,552,000	2,050,000	1,834,000	3,884,000	.66
Dam Excavation	485,000	300,000	820,000	1,120,000	.43

The Staff's estimates in Comparison II are about halfway[55] between that of PNPC and WPPSS and are used in Tables 8 and 9 to compare the annual

costs and benefits of the rival plans for the four levels of development (Staff br. pp. 177-188). This "broad brush" approach is adopted by WPPSS in its reply brief (p. VI-I).

The Staff estimates represent the maximum reasonable cost differential for comparative purposes (see tables 8 and 9,[56] and chart 1, Staff br. p. 187). However, as pointed out in PNPC's reply brief (p. 156), the Staff approved PNPC's original comparative cost estimates (Tr. 1521), and has never repudiated the validity of its earlier direct presentation. WPPSS at Nez Perce has gone from an initial estimate of $403,400,000 (WPPSS Exh. 19-A) to $307,500,000 (WPPSS Exh. 258) for the Harza arch dam and underground powerhouse—a figure within two percent of the original Ebasco estimate presented by PNPC (PNPC Exh. 16). The Staff Comparison II figures include the lowest of the three Staff estimates for Nez Perce, but not the lowest Staff estimates for High Mountain Sheep and Lower Canyon. Consequently, these Staff figures are most

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	Construction Cost: Difference between High Mountain Sheep Plan and Nez Perce Plan (Without Whitebird and fish facilities)	
PNPC	$ 2,575,000	
WPPSS	93,036,000	
(Mid-point)	47,806,000	
FPC (Comp. II)	43,316,000	(Lower Canyon with 800,000 kw)
FPC (Comp. II)	49,616,000	(Lower Canyon with 910,000 kw)

56 Staff tables 8 (Sheet 1) and 9 are attached as Appendix D and E.

adverse to the High Mountain Sheep plan. It is appropriate to compare the least expensive Staff estimate for the Nez Perce plan with its least expensive estimate for High Mountain Sheep. If the lowest Staff estimate for the High Mountain Sheep plan ($406,933,000) is chosen, the differential adverse to High Mountain Sheep is reduced from $49,616,000 to $13,460,000,[57] (Table 8, Staff br. 187). This latter figure is dopted as the *minimum* reasonable cost differential for comparative purposes.

The Staff used annual values stipulated by the parties in Part J of applicants' Joint Statement for annual power benefits, flood control benefits, and annual operation and maintenance costs. These were calculated using the same cost of money, amortization, interest replacement, and insurance rate. The Staff used a 4½ percent cost of money, although PNPC argues that a rate of 2½ percent should be used since this is the basis employed by the federal government in determining the economic feasibility of water resource projects. The use of a 4½ percent rather than a 2½ percent cost of money adds between $700,000 and $800,000 annually to the cost of the High Mountain Sheep project, as estimated in the Staff's Comparison II figures. PNPC protests that a 2½ percent rate was used by the Staff in the earlier Mountain Sheep—Pleasant Valley proceeding where the lower rate was to the disadvantage of PNPC (PNPC reply br. p. 166). Nevertheless, the use of a 4½ percent cost of money for comparative purposes is more realistic, in terms of the actual market cost of money, and consequently superior for a true economic comparison. No one is proposing federal development.

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[57] $406,933,000 less $393,473,000 = $13,460,000.

The differences in annual costs[58] between the two plans, as might be expected, vary consistently with the differences in capital cost estimates. Using Staff Comparison II (see Table 9, Appendix E) the High Mountain Sheep plan is superior to the Nez Perce plan in the initial or most important period. The Nez Perce plan is superior to the High Mountain Sheep plan in the subsequent periods (Part I, Joint Statement).

Using the High Mountain Sheep plan estimates originally presented by the Staff in its direct case (FPC Exhs. 49-52) with a construction cost differential of $13,460,000 in favor of the Nez Perce plan; the annual cost differential is reduced to approximately $937,000.[59] On these cost assumptions, the High Mountain Sheep plan is superior to the Nez Perce plan at all stages of development except the final period when all common reach developments are in with Crevice Storage (Appendix E).

In evaluating the significance of these cost estimates it must be emphasized that there are hundreds of differences in detail in the many different designs in the record, and that a minor change in any detail of design, foundation

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58 Annual Cost

	Differences between High Mountain Sheep Plan and Nez Perce Plan Using O&M and A&G determined by each party	Using Stipulated O&M and A&G
PNPC	$ 283,000	$ 805,000
WPPSS	6,376,000	5,653,000
Mid-point	3,330,000	3,229,000
FPC (Comp. II, Lower Canyon with 800,000 kw)	$2,947,000	3,007,000
FPC (Comp. II, Lower Canyon with 910,000 kw)	$3,454,000	3,345,000

59 $\frac{13,460\ (3454)}{49,616} = 937,013$

lines, or location, may produce a major change in costs. Thus, if geological conditions preclude underground powerhouses at Nez Perce, costs would increase from $391,080,000 to $463,000,000,

the original estimate. The difference in details, however, between the engineering of the two plans does not affect substantially the operation of the several projects in the alternative plans or the annual power benefits agreed to in the applicants' Joint Statements, Parts I and J. All the designs are preliminary and were prepared for administrative proceedings and not as construction designs. Neither of the proposed projects in the license applications has been finally designed. Certainly, the projects in the comparative plans, for which no license application is pending, have been studied in only the most preliminary manner. Consequently, these capital cost estimates are not precise and are subject to considerable variation in costs between the preliminary designs provided for the purpose of FPC license applications and final construction designs (Tr. 2059-60 and 3140-48).

The inevitable differences in estimating techniques[60] render any construction cost estimate for comparative purposes contingent, variable, and tentative within at least a 10 percent range,[61] or roughly forty million dollars on the

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[60] "The estimating technique of the cost estimator, of course, influences the range in estimates in all instances." (Staff br. p. 173) For example, Harza allows a flat 15 percent for contingencies on *all* projects. Ebasco allowed 14.2 percent (N.P.) 14.5 percent (L.C.) and 10.8 percent (H.M.S.) on the theory that the unknowns are less at High Mountain Sheep (PNPC br. p. 247).

[61] The differences in the three Staff estimates of capital costs between High Mountain Sheep and Lower Canyon vs. Nez Perce range from 1.8 percent ($4,095,000) to 13.8 percent ($29,734,000). See Table I, PNPC br. 16, Sheet 2 of 2.

basis of the total cost of the two plans. The range in variation of construction cost estimates (without fish facilities) for High Mountain Sheep is about 20 percent for Nez Perce, and about 33 percent for the Lower Canyon project. Confining ourselves to Staff estimates, the cost of the High Mountain Sheep plan ranges from $406,933,000 to $443,089,000; the Nez Perce plan from $393,473,000 to $433,514,000. Consequently, the total construction costs of the rival plans are quite close for purposes of a general economic comparison under Section 10(a) of the Act. Moreover, it should be emphasized that the geological conditions at Nez Perce may not permit the construction of underground powerhouses and an orifice spillway as presently estimated and designed ($391,080,000). If these conditions require a return to WPPSS' original design, total costs could rise as high as $463,000,000, the amount to be raised by revenue bonds in WPPSS' original finance plan (WPPSS Exhs. 77, 161, Rev.)

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Applicability of Section 10(h) of the Act

WPPSS argues (br. pp. 321-336) that PNPC is ineligible for a license because it is a combination in restraint of trade —a monopoly, prohibited by Section 10(h) of the Act.[62] WPPSS alleges that "the four dominant utilities [PNPC's sponsor companies] in the Northwest have combined to gain exclusive control of the last important source of hydroelectric power in the Northwest and to deny access to such power to all other users critically dependent upon that source to help meet their potential needs." WPPSS also

[62] Section 10(h) provides in pertinent part: "That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited."

asserts that licensing PNPC will violate the provisions of the Sherman Act by providing PNPC and "its four member companies an unlimited opportunity to join together and fixe prices for power." (WPPSS br. pp. 326, 327)

WPPSS cites *U.S.* v. *Terminal Railroad Association*, 224 U.S. 383 (1912), the Associated Press case, 326 U.S. 1 and related decisions under the Antitrust laws for the undeniable proposition that a combination or conspiracy to obtain exclusive control of a vital service facility or commodity violates the Sherman Act.

The difficulty here is that the facts in the instant proceeding bear no discernible relationship to the facts in the classic monopoly cases cited by WPPSS. WPPSS states that the peak loads served by these companies as forecast for 1970-71 will be 5,894,000 kw as against its estimate of 2,669,400 kw for the 38 WPPSS participating utilities (br. p. 325). PNPC is seeking a license under the Federal Power Act to meet the concededly urgent needs of its member companies for additional generation to serve their own customers. There is no evidence whatsoever that PNPC or its member companies are seeking to obtain exclusive control over hydroelectric power generation in the Pacific Northwest generally or in the stretch of the Middle Snake involved in this proceeding. Many electric companies operate on an integrated basis, producing and transmitting most, sometimes all, of the power they distribute at retail. The 1960 annual report of the Bonneville Power Administration indicates that 59.2 percent of the energy generated by the major utilities of the region was provided by federal agencies, that 35.7 percent of this energy went to publicly owned utilities, 35.5 percent to industries and federal agencies, and only 18.8 percent to privately owned utilities. The power generated by the PNPC member companies for the period covered by the report was as

follows: Montana Power Company 5.7 percent, Washington Water Power Company 5.5 percent, Pacific Power and Light 4.9 percent, and Portland General Electric Company 2.8 percent. The report further indicates that the member companies are substantial purchasers of excess capacity from the non-federal public utilities. (See Table 2, p. 11)

The Staff points out that the issuance of a license by the Commission for either of the two projects applied for automatically excludes any conflicting project[63] (Staff br. p. 217). However, it should be noted that the grant to PNPC of a license for the High Mountain Sheep project does not exclude WPPSS, or any other applicant, from access to the power resources of the Middle Snake. Lower Canyon, an essential component of the High Mountain Sheep plan, remains open for development by any qualified applicant who can meet the requirements of the Federal Power Act. And the Board of Directors of WPPSS have authorized the filing of an application to construct Lower Canyon upon the completion of High Mountain Sheep (WPPSS' motion for leave to file amendment, April 24, 1961).

Moreover, as pointed out by both PNPC and the Staff, Section 10(h) of the Act deals with conditions to be imposed upon the grant of a license and not with prequalifications for the issuance of a license. Its legislative history indicates it was designed to protect the public against the misuse of an FPC license by authorizing Commission sanctions for anti-trust violations (Senate Committee Report No. 180, 66 Cong. 1st Sess. p. 4 (1919)).

WPPSS' price-fixing contention is equally fallacious. If licensed, PNPC would be subject to Part II of the Federal

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[63] Citing *Ashbacker Radio Co.* v. *FCC*, 326 U.S. 327, 332.

Power Act which regulates rates and charges to protect consumers against excessive prices.[64]

Similar contentions of monopoly were made in the prior proceeding on Project No. 2173, and the evidence therein reviewed in considerable

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detail by the Presiding Examiner (pp. 67-74). He concluded that there was no basis for the allegations.[65]

There is no evidence in this proceeding of an illegal combination to restrain trade, excessive price-fixing, or an intent by PNPC to use High Mountain Sheep for such purposes. The record clearly shows the urgent need of the sponsor companies for low cost hydro-generation to avoid the necessity for higher cost thermal power. The purpose of PNPC's license application is to expand, not limit, the output of electrical energy. The cooperation of PNPC's sponsor companies is required because the size of the project, and its capital requirements, justify a joint undertaking in which several companies share the costs and risks involved.

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[64] "A major purpose of the whole Act is to protect power consumers against excessive prices." *Pennsylvania Water Co.* v. *F.P.C.*, 343 U.S. 414, 428 (1952).

[65] (Initial Decision p. 74)

"Upon consideration of all of the evidence on this subject in this record it is concluded that there is no basis for the inference either that (1) Ebasco Services exercises any control over the policies of the four organizing companies or that (2) the agreement between the four organizing companies each to supply ¼ of the equity financing for the proposed project and each to purchase and pay for, at cost, one-fourth of the entire output thereof now constitutes, or will hereafter constitute a combination, agreement, arrangement or understanding express or implied, to limit the output of electrical energy to restrain trade, or to fix, maintain or increase prices for electrical energy or service within the meaning of Section 10(h) of the Act."

In short, PNPC is seeking to do no more than WPPSS to obtain a license to construct the proposed project as provided by the Federal Power Act.

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Permits, Priority and Preference

(a) *PNPC's Preliminary Permit*

On April 8, 1955, a preliminary permit was issued to PNPC under Section 4(f) of the Act, for a period of three years, effective as of April 1, 1955, "for the sole purpose of maintaining priority of application for a license for Project No. 2173" (14 FPC 644). PNPC's application for High Mountain Sheep Project No. 2243 was filed on March 31, 1958, prior to the expiration of the permit, and states that it was filed pursuant to the preliminary permit.

PNPC claims priority for its High Mountain Sheep application by virtue of the permit under Section 5 of the Act. WPPSS and the Staff assert that the priority granted by the permit is limited to a specific project for a specified site and terminated when the license for Project No. 2173 was denied by the Commission on January 20, 1958.[66] (Pacific Northwest Power Company (19 FPC 127, 353)). I find no basis for this contention. If, as I believe, the PNPC permit was not terminated by the Commission's denial of Project No. 2173, PNPC's current application is entitled to pri-

[66] See *In the Matter of Warrior River Electric Cooperative Assn.*, 11 FPC 693 (p. 694) "The investigations, explorations, studies, and financial arrangements to be male by the holder of a preliminary permit enable the permittee to consider and determine the definite form and character of the project it may desire to propose in an application for license."

ority under Section 5 of the Act even as against a preference claimant under Section 7.[67]

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Section 5 authorizes the issuance of preliminary permits:

> . . . for the sole purpose of maintaining priority of application for a license under the terms of this Act for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements.

WPPSS claims [and the Staff agrees] that it is a municipality under Section 3(7) of the Act and that, as such, its application is entitled to "preference" over PNPC under Section 7(a) of the Act which provides that the Commission:

> In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference

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[67] See text of Section 7(a) quoted below and hearings before the Commitee on Water Power of the House of Representatives, 65th Cong. 2nd Sess. ((1918), p. 55) in which Congressman Merrill stated in part: "It is hardly a reasonable situation for a municipality to wait until the private individual or corporation has gone in and spent $100,000 or $200,000 and then come in and push them out."

to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

PNPC denies that WPPSS is a "municipality" as defined in the Act, and argues that, even if it is, it may not assert such preference "because of laches, and because of failure to follow the Rules of the Commission provided for filing of applications" (PNPC br. p. 320).

PNPC's claim of priority for its High Mountain Sheep application turns on the scope of the preliminary permit and the effect of the Commission's denial of PNPC's application for Project No. 2173. The text of the statutory provisions dealing with permits, and the few available administrative interpretations, suggest that the scope of a preliminary permit is not confined to "a specific project for a specified site" but extends to any development in the particular stretch of the river covered by the application which the Commission finds, after investigation, . . . "will be best adapted to a comprehensive plan" under Section 10(a) of the Act.

PNPC's application to the Federal Power Commission includes the resolution of its Board authorizing its officers "to apply . . . for a Preliminary Permit . . . to make studies, surveys, and investigations

of the feasibility of hydroelectric power developments *in the vicinity of the* Mountain Sheep and Pleasant Valley Hydroelectric sites on the Snake River, in the States of Idaho and Oregon, for the purpose of enabling the company to secure the data and perform the acts required by law for *filing an Application or Applications* for the is-

suance of a license or licenses;" [(emphasis supplied) See Exhibit B of the application on file with the Commission.]

The permit is issued to encourage the permit holder to make the advance engineering, geological, and economic studies necessary in determining the best site and project design for developing the reach of the river covered by the permit. As stated by the Commission in a recent "Order Denying Application For Preliminary Permit," issued April 2, 1962: (*Georgia Power Company*, Project No. 2303)

> The purpose of a preliminary permit is to grant the permittee priority for filing an application for a license, but this priority is not available merely for the asking. *It is granted in a situation where the feasibility of a project in a particular stretch of a river has not as yet been demonstrated. It gives the permittee a priority over other non-Federal parties in order to encourage the investigations of projects which otherwise might never be investigated or built.* In the instant case, the engineering and economic studies for developing the reach of the Flint River for which the Applicant seeks a permit have just been completed by the District and Division Engineers who recommend that these three projects be constructed by the United States as the first phase of the comprehensive plan described in the report. The studies which a preliminary permit are designed to encourage have thus adready been made at public expense and should therefor be available on an equal basis to any part which may wish to develop these water resources in the event Federal development is not authorized. Applicant like all other potential developers has access to these studies and may of course file an application for a license without a prior preliminary permit. We onclude Applicant has not demonstrated a justification for a proposed preliminary permit. (emphasis supplied)

Sections 4(f), 5, 7(a), and 10(a) provide in substance that if a permittee makes the necessary investigation to determine which project is best adapted to a comprehensive plan for development of the "particular stretch of a river", any application for a license by the permit holder will have priority, provided it is filed before the permit has expired, or been terminated, and covers the project which the Commission ultimately determines is best adapted for the development of the particular reach of the river. Of course, "There is no assurance that in issuing a preliminary

permit the Commission will ever issue a license for a particular project covered by the permit." *in the Matter of Linoma Power Co.*, 8 F.P.C. 999. But obviously, neither the Commission, nor an applicant for a preliminary permit, nor the permittee, is required to guess at their peril, before the completion of the studies and investigations which project ultimately will be best adapted within the meaning of Section 10(a) of the Act for licensing. Nor does the statute impose this hazard.

The protection of the permit is not confined to the licensing of the specific project at the specific site described in the application for the permit. The description in the application (in the vicinity of the Mountain Sheep and Pleasant Valley sites) is merely to identify the stretch of the river within which the feasibility of a project for licensing will be investigated and the project or projects to be initially investigated.[68] The protection of the permit extends to any project which has been investigated by the

[68] High Mountain Sheep is located at river mile 189.2; Low Mountain Sheep at river mile 192.6.

permittee within the sites and areas of that reach[69] for which a timely license application has been filed and which the Commission finally determines to license.

The Staff agrees that "the permit has for its purpose the protection of time and funds invested by a prospective applicant for a license in establishing the best site and project design to be included in an application for license provided such application is filed by the permittee within the period of the permit" (Staff br. p. 222). Nevertheless, continues the Staff brief, "This . . . does not relieve the permittee of the responsibility of so designing its project that it will be best adapted to a comprehensive plan of development, nor of the consequences of a denial of the application for license on its own merits should such application be filed within the period of the permit."

If the Commission licenses High Mountain Sheep, as recommended by the Staff, the permittee here (PNPC) will have met its responsibility of designing and filing a timely application for the licensed project. And it will have made "a total expenditure approaching $5,000,000" [70]

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in reliance on the preliminary permit and the invitation of the Commission in its decision denying a license for Mountain Sheep and Pleasant Valley, Project No. 2173.

In the earlier proceeding, Project No. 2173, PNPC was the sole applicant seeking a license for Mountain Sheep-Pleasant Valley. The Staff recommended, both before the

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[69] " . . . The Nez Perce and High Mountain Sheep sites are alternate locations for a hydroelectric project which will develop a common reach of the Snake River in Oregon and Idaho" *In the Matter of the Application of WPPSS*, etc. No. 33275, Superior Court of the State of Washington, p. 2. (February 13, 1962)

[70] PNPC reply br. p. 109.

Examiner[71] and the Commission[72] that PNPC file an application for a license to build Nez Perce. Implicit in this invitation was the assumption that any new application, if filed before the expiration or cancellation of the preliminary permit, would not result in the loss of PNPC's statutory priority. Certainly the Staff was not seeking to entrap PNPC or to deprive it of its priority under the permit. The Commission, in its decision denying the application for Project No. 2173, agreed with the Staff and invited, without requiring, PNPC to file an application for Nez Perce (19 F.P.C. 127, 135, 353).

The Commission did not terminate or cancel the permit as it was authorized to do under the Order issuing the permit. Article 3 of "Terms and Conditions of Preliminary Permit (16 F.P.C. 1303) provides in pertinent part: (p. 1304)

> The priority granted under the permit will be lost if the permit fails to fulfill the requirements of the permit, if the permit is cancelled by order of the Commission, or if in course of consideration by the Commission of said application for license, the permittee shall not on or before the date of expiration of the permit, or such later date as may be fixed by the Commission: [A, B, C, D]

Article 8 provides that the permit may be canceled by order of the Commission upon failure of the permittee in good faith to begin or diligently to prosecute the investigations, examinations, and surveys contemplated under the

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[71] (Initial Decision, p. 83) "This Examiner is sympathetic toward the Staff's suggestion that the applicant review its application to request a license for the Nez Perce Project."

[72] (Exceptions p. 2) " . . . Applicant should construct Nez Perce if it is to construct any project in the Nez Perce stretch of the River."

permit "or for any other good cause shown after notice and opportunity for hearing". This authority has been exercised on numerous occasions.[73]

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Article 8 is based on Section 5 of the Act which provides that a permittee's priority of application for a license continues for the stated term, not exceeding three years, and may be "canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing." It is not contended that PNPC's permit was canceled. The Staff does contend that "A preliminary permit grants only one priority and that priority attaches" . . . or merges with the application in the prior proceeding which terminated in denial (Staff br. p. 222). The statutory priority, however, is not a ticket good for one ride. It extends its protection during the entire period of the preliminary permit and covers any timely filed application. The opinion of the Chief Counsel dated March 5, 1923, cited by the Staff (p. 222) holds only that the Act extends the protection of the priority under the permit *beyond* the three years where an application for license has been timely filed and is pending.[74] Neither the Act nor the Regulations (Sec. 480-486) limit permittees to one application or one priority absent cancellation by the Commission as provided in Article 3 or 8 of "Terms and Conditions

[73] Most recently (April 16, 1962) in WPPSS Project No. 2257, where the Commission issued an order denying application for extension of Preliminary Permit on the ground generally of inadequate study and investigation of the proposed project.

[74] The issue posed to the Chief Counsel by the Executive Secretary was whether the priority expired with the expiration of the permit. The Chief Counsel ruled in substance that it continued so long as a properly filed application for license was pending. (Third Annual Report of the Federal Power Commission (p. 222-23)).

of Preliminary Permit" (16 F.P.C. 1303), or failure to file a timely license application in conformity with Commission rules. The common law doctrine of merger has no application to the scope or duration of a preliminary permit under the Federal Power Act. I conclude, therefore, that PNPC's High Mountain Sheep application is entitled to priority by virtue of the preliminary permit issued on April 8, 1955.

(b) *WPPSS Status under Section 7(a) of the Act*

Section 7(a) provides in substance that, where no preliminary permit has been issued, preference be given to municipalities in the issuance of licenses provided the plans are equally well adapted to developing the resource in the public interest, or can be made so within a reasonable time. WPPSS asserts that, as a municipality, it is entitled to preferential treatment "to construct whichever project the Commission decides to license for the development of the river reach involved by the filing of its Nez Perce application" (WPPSS br. p. 304). The scope of the statutory preference, where applicable, under Section 7(a) is as broad as the scope of a preliminary permit under Section 4(f) of the Act, and covers any license for the river reach involved provided the other requirements of the Act and the Regulations are satisfied.

WPPSS filed a timely license application urging that Nez Perce, rather than High Mountain Sheep, was best adapted to a comprehensive plan of development for this reach of the river. It still maintains this

position. However, on September 12, 1961, after the close of the hearing WPPSS moved to amend its application to include a High Mountain Sheep Project, the plans, designs, and cost estimates for which were presented as part of its

rebuttal attack on PNPC's High Mountain Sheep Project at the same site, while still maintaining the superiority of Nez Perce. WPPSS claims, in short, that it is entitled to a license, as a matter of statutory preference for whatever project the Commission deems best in accordance with Section 10(a)" (WPPSS br. p. 311).

The Staff, although rejecting Nez Perce in favor of High Mountain Sheep as "the most adaptable to a plan of comprehensive development of this stretch of the Snake River," agrees that "the effect of Section 7(a) requires the granting of WPPSS' motion to amend its application so as to include its plans for a High Mountain Sheep Development." (Staff br. p. 224)

PNPC argues that WPPSS is not a municipality and may not assert any statutory preference to either Nez Perce or High Mountain Sheep because of laches and failure to comply with Commission Rules for the filing of license applications.

Section 3(7) of the Act defines a municipality as a "city, county, . . . or other political subdivision *or agency* of a state competent . . . to carry on the business of developing, transmitting, utilizing or distributing power." WPPSS was created by virtue of a Washington statute which permits "any two or more cities as public utility districts . . . to form *an operating agency* . . ." and declares each "*such agency* . . . a *municipal corporation of the State of Washington* . . ." (RCW 43.52.360 (emp. supp.)). PNPC argues that since Nez Perce is outside of the State of Washington on the boundary line between Oregon and Idaho, it is not a "municipality" but a private corporation as to out of state activities.

WPPSS is a state agency authorized to carry on the business of developing and distributing power. As such, it is a municipality within the State of Washington under

Section 3(7) of the Act. See *Washington Public Power Supply System*, 23 F.P.C. 109, 24 F.P.C. 21. Nevertheless, its authority under State law to carry on proposed projects on the Snake River outside the State of Washington is in doubt, and remains unresolved. *In the Matter of the Application of Washington Public Power Supply System for an Order relating to Additional Projects.*[75] Judge Murray of The Superior Court of the State of Washington for Thurston County observed:[76]

> There is in my mind a very serious doubt as to the legal competency of the Supply System to carry on construction projects beyond the State of Washington, but do not believe the question can be properly raised or determined before the Director in this proceeding or before the Court on this Appeal. (Opinion, p. 9)

The problem is further complicated by doubts as to WPPSS' legal capacity to construct and operate hydroelectrict facilities in Idaho and Oregon where the proposed projects are located. This is not to say that WPPSS must obtain a state permit or authorization before a federal license can be issued. *First Iowa Hydro-Electric Cooperative* v. *F.P.C.*, 328 U.S. 152 (1945) clearly holds that compliance with state law is not a condition precedent to a federal license. It does mean that in a comparative proceeding a claim of preference as a municipality under Sec-

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[75] An appeal from an order of the Director of Conservation authorizing WPPSS to construct Nez Perce or High Mountain Sheep if licensed by the Commission.

[76] See also *State ex rel. P.U.D. No. 1 of Skagit County* vs. *Wylie*, 28 Wash. 2d, 113, 182 $P_2$706 (1947) and *Jewett* vs. *PUD No. 1 of Stevens County, Wash. No. 13782* (April 1951) holding that a public utility district is not authorized to own and operate hydroelectric properties outside Washington State.

tion 7(a) should be supported by some affirmative proof[77] of WPPSS' authority and ability under the laws of Washington, Idaho, and Oregon to undertake and complete the project for which it seeks preference. WPPSS has submitted no evidence of its legal power to operate as a municipality outside Washington and in the States of Idaho and Oregon. In those states it will be treated as a foreign—not a municipal—corporation. (See briefs of Oregon and Idaho Public Utilities Commissions, Interveners). While the Commission still has power under the Act to license WPPSS, should it decide to do so, sound regulatory policy suggests that a claim of preference in a comparative proceeding requires an affirmative showing of why one applicant is to be preferred. Here WPPSS has studiously avoided giving the Oregon and Idaho[78] authorities an opportunity

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to express their views on its proposal or its power to operate where the project will be located. The relative abilities

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[77] The entire section [9b] is devoted to securing adequate information for the Commission as to pending applications for licenses. Where 9(a) calls for engineering and financial information, 9(b) calls for legal information." *First Iowa et al., supra* (p. 177)

[78] The brief of the Idaho Public Utilities Commission, Intervenors, concludes (p. 20) " . . . the admission of WPPSS that it does not intend to comply with the laws and regulations of the State of Idaho raises serious doubts as to the fitness, character and qualifications of WPPSS as a licensee. WPPSS does not possess the ability to perform the duties of a licensee of the Federal Power Commission and should be denied a license for any project to be constructed within the borders of the State of Idaho." The Oregon brief states "It is argued by WPPSS that proof of these matters is not necessary, that compliance therewith has been superseded by federal law and that in any event they can be resolved later. In a license proceeding by one party this may be a satisfactory procedure; however in a situation where the FPC is confronted by competing applicants, one of which endeavors to comply with state requirements and the other's ability to comply is doubtful, the 'duality of control' between 'cooperating agencies of government' requires in the public interest that the license be granted to the former. Failure to require and consider such compliance or absence of it would be indicative of arbitrary and capricious action on the part of the Commission."

and capacities of the applicants to carry out their plans under local law is a relevant consideration in a comparative proceeding. In this area, WPPSS has failed to support adequately its entitlement to preference over PNPC.

Section 9(b) of the Act requires the submission of "Satisfactory evidence that the applicant has complied with the requirement of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act."

WPPSS' failure to submit such evidence in this proceeding is no bar to an FPC license as a matter of Commission power and jurisdiction. See *First Iowa*, cited *supra*. Nevertheless, due regard for local laws and sensibilities requires the Commission, as a matter of its own policy, to consider information as to the comparative status of rival applicants in the areas involved. Moreover, Section 7(a) of the Act provides in substance that the Commission be satisfied as to the ability of the applicant to carry out its plans. The Commission has a legitimate interest in knowing which applicant is more likely to complete the proposed project on schedule without a long drawn-out contest with hostile local authorities before construction can commence. The experience in the *City of Tacoma* case is instructive. Project No. 2016 covering the Mossyrock and Mayfield developments on the Cowlitz River in Washington was licensed in 1951 (10 F.P.C. 432). The determined opposition of State agencies[79] delayed completion of Mayfield,

[79] See *State of Washington Department of Game* v. *F.P.C.*, 207 F. 2d 391 (9 Cir. 1953) cert. den. 347 U.S. 936, *City of Tacoma* v. *Taxpayer of Tacoma*, 357 U.S. 20 (1958).

the smaller project, and the construction of Mossyrock has not yet been started.

The Supreme Court has approved the Commission's view that delay is a relevant consideration in whether to recommend federal construction under Section 7(b) of the Act. It is equally relevant in whether to prefer one applicant over another under the public interest standard of Section 7(a) of the Act. (See *U. S. ex rel. Chapman* v. *F.P.C.*, 345 U.S. 154, 1951). PNPC has made a superior showing of its status under local laws and its ability to carry out its plans under such laws.

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Nor do I agree that Section 7(a) requires the Commission to license WPPSS for whatever project the Commission deems best. The statutory preference does not come into play until and unless a proper application has been filed for a specific plan of development as well adapted as the plan of other applicants.[80] WPPSS filed for Nez Perce,

[80] Hearings before House Committee on Water Power, March 18 to May 15, 1918 (65th Cong., 2d sess.) fn. 4, at p. 816. In the debate in the Senate on S. 1419, a predecessor to the Federal Water Power Act of 1920, Mr. Doremus (Michigan) offered an amendment to Section 7: "That in issuing preliminary permits or licenses hereunder the commission *shall* give preference to applications therefor by States and municipalities provided the plans for the same are deemed by the Commission *as well* adapted to conserve and utilize in the public interest the navigation and water resources of the region *as the plans of other applicants;* . . . ." In explaining this amendment he said, at 56 Cong. Rec. 9804: "Mr. Chairman, section 7 as it is now written would place States and municipalities at a disadvantage in the event they desired to file applications under this bill. It would require them to shew to the Commission that the plans they submitted were better plans than those submitted by private applicants. The effect would be to work a discrimination against States and municipalities that desire to compete with private applicants for the privileges extended under this act. *The sole purpose of this amendment is to place States, municipalities, and other political subdivisions upon an equality with private applicants.* Hence the amendment." (emphasis supplied)

PNPC for High Mountain Sheep. If, as recommended by Staff, High Mountain Sheep should be licensed, PNPC is the only applicant for this project unless, and until WPPSS' motion to amend its Nez Perce application to include a High Mountain Sheep project, filed after the close of the hearing, is granted. For reasons detailed earlier, this motion should be denied.

The Staff reads Section 7(a) of the Act as requiring, as a matter of law, the granting of WPPSS' motion to amend its Nez Perce application so as to include its plans for a High Mountain Sheep development.

Section 7(a) does not require the Commission in a comparative hearing to afford a municipality, whose plan of development has been rejected as inferior, an opportunity to adopt the superior plan presented by a rival non-preference applicant as a matter of right. The preference is not absolute (see *City of Holyoke Gas and Electric Department,* 8 F.P.C. 471 (1949). Such an interpretation would discourage, if not eliminate entirely, contrary to the objectives of the Federal Power Act, the investigation of prospective hydroelectric projects by private non-preference interests.[81]

Section 7(a) permits modification of a plan properly submitted by a preference applicant so as to achieve equality; not its discard, in the event of rejection, in favor of a rival's mutually exclusive and inconsistent project merely because it is the one that will be licensed. The WPPSS and Staff proposal converts a preference where plans are

[81] See *Federal Power Commission* v. *Niagara Power Corporation,* 347 U.S. 239 (1954) "The Act was dedicated to 'encouraging private enterprise and the investment of private capital' in power projects on a basis consistent with the public interest," citing *Chapman* v. *F.P.C.,* 345 U.S. 153 (1951).

equal[82] into a permanent statutory priority available at any stage of the proceeding prior to licensing.

The Commission has held from the beginning that a preference applicant must defer to the holder of a temporary permit [Niagara Falls Power Co.] where there is a conflict of applications (*City of Lockport*, 1 F.P.C. 7, 11 (1942)):

> "The Commission clearly recognizes and is in accord with the purpose and intent of the statute to give preference to States and municipalities if and when there is a conflict of applications before any priority has attached, but is of the opinion that the city of Lockport has not, under the facts now before the Commission, initiated any right to the statutory preference and therefore the Commission is unable to entertain or consider such application at this time.

A contrary interpretation would stultify the basic objective of the Act—to encourage non federal development while safeguarding the public interest (President's Water Resources Policy Commission (Vol. 3, p. 273) Moreover, it is unfair to PNPC. The Staff, which favored the Nez Perce plan in the earlier proceeding, now agrees that High Mountain represents the superior plan. WPPSS, if licensed to build High Mountain Sheep, would be permitted to skim the cream off the milk produced by PNPC's efforts. More importantly, however, is the damage to the public interest. The comparative hearing was a contest between two rival plans and their proponents. If a municipal loser can be licensed merely by offering to build its rival's successful

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[82] ". . . States and municipalities are accorded a preference right to licenses *on even terms* over citizens . . . ." See comments of Senator Jones, Chairman of the Senate Committee on Commerce discussing the proposed legislation, 59 Cong. Rec. 246 (1919) (emphasis supplied).

plan, it would be foolhardly for private utilities to enter such a loaded proceeding in the first place. Their investigation of prospective development sites, as envisaged by the Federal Power Act, would cease. The public interest would be the ultimate loser.

Accordingly, I do not read Section 7(a) of the Act as requiring the Commission to grant WPPSS' motion to amend its Nez Perce application so as to authorize a license for High Mountain Sheep. The grant or denial of WPPSS's motion is a matter within the Commission's sound discretion and, for reasons discussed elsewhere, the motion is denied.

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Federal Developemnt

Section 7(b) of the Federal Power Act requires that both pending applications for license be denied if, in the Commission's judgment, Federal development should be undertaken. The record was closed on September 12, 1961, with no recommendation for Federal development in evidence. As noted in the Staff brief (p. 225) filed March 1, 1962:

> The record reveals an immediate need for the power which could be produced by the High Mountain Sheep Project and that this project is best adapted to a comprehensive plan for developing the Middle Snake River. The record also discloses that the two applicants have spent considerable sums to develop designs, and that both applicants have indicated a willingness to begin construction immediately upon receipt of a license. There is of course no reason why the High Mountain Sheep Project could not be constructed at this time by the United States itself in the event Congress authorizes such development. On the other hand

there is no compelling reason for the Commission, under Section 7(b), to recommend to Congress construction of either project by the United States. Consequently the Staff does not suggest that the Commission recommend development by the United States. It is also to be noted that neither the Corps of Engineers nor the Department of the Interior have recommended such construction to the Commission in their reports on the applications.

Section 7(b) reads as follows:

> Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development."

The position of the Department of Interior was first expressed in a letter to the Federal Power Commission of November 21, 1960 (FPC Exh. 42) urging delay in licensing either Mountain Sheep or Nez Perce. This view was supplemented by letter of March 15, 1961, withdrawing permission for Department of Interior personnel, whose prepared testimony had been served on the parties and copied into the transcript, to appear as witnesses. The

letter suggested a recess or suspension of the hearing then in progress for the duration of "accelerated fish studies" with a target date set at the end of 1964, and concluded:

> . . . We believe that potential alternative sources of new power make prudent such a delay in further consideration of projects for the Middle Snake.
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> For the reasons above stated, the Department of the Interior recommends that neither the proposed High Mountain Sheep Project not the proposed Nez Perce Project be licensed at this time.

On June 28, 1962, the Secretary wrote to the Chairman modifying the prior position of the Department of Interior in part as follows:

> . . . we believe that the varied and predominantly Federal interests involved in the development of this area of the Snake River outweigh other considerations and indicate that the Commission should recommend to Congress that the Mountain Sheep Dam should be built by the United States.

The change was supported by the following arguments: (1) hydraulic and electrical coordination with other Columbia River Basin projects could be more effectively achieved if the High Mountain Sheep project is a part of the Federal system; (2) the Mountain Sheep project represents less hazard to the fishery resource than the Nez Perce project and fish facilities can be incorporated and modified in a Federal project with greater flexibility than in a non-Federal project; (3) storage releases for navigation requirements could be made under Federal ownership and operation with less effect on power supply; (4) Federal construction would result in a lower cost of power; (5) Federal ownership would allow more precise and intimate coordination control than any agreement with non-Federal entities; (6) questions involving adjustment, offset or pay-

ment to non-Federal licensees for operation would be avoided; (7) assurance of continued availability of Salmon River for fishery and recreational resource would be an important element toward over-all-balance in a truly comprehensive plan for utilization of the water resources.

On July 6, 1962, the Commission reopened the record so as to include the Secretary's letter of June 28th (Exh. 43-A) as a statement of his current position, and provided an opportunity for the parties to file

supplemental briefs commenting on the current views of the Secretary. Supplemental briefs were filed by both applicants, Staff,[83] State of Washington Departments of Fisheries and Game, Oregon Public Utilities Commissioner, Washington State Departemnt of Conservation, Columbia River Tuna Packers Association, Washington State Sportsmen's Council, Inc., Oregon Wildlife Federation, Fishermen's Cooperative Association, Inc., Northwest Fisheries Association, Alaska Fishermen's Union, Pacific Fish Conservation League and Makah Indian Tribe.

All oppose Federal development[84] on the ground generally that issuance of an FPC license for non-Federal development now will provide identical or greater public benefits without the indefinite delays attendant upon a denial of the pending applications and a belated recommendation for Federal development.

1. The Secretary's recommendation is, of course, entitled to careful consideration, but the primary responsi-

[83] The Staff brief refers to two letters, not of record, one dated April 25, 1962, from the Secretary of the Army (App. D), the other dated April 11, 1962, from the Bureau of the Budget (App. E). WPPSS submitted a third letter dated March 14, 1962, from the Secretary of Interior to the Secretary of the Army. Official notice is taken of all three letters.

[84] The Columbia River Tuna Packers Association opposes any development.

bility remains with the Commission. The letter (FPC Exh. 43-A) is not evidence *per se* of the validity of the facts alleged therein in support of the Secretary's recommendation. The reasons given for denying both pending applications and recommending Federal development, and the facts cited in support thereof, must be evaluated in the light of the entire record, the briefs, the statute, and the Commission's prior policy in dealing with similar recommendations.

When is a recommendation for development by the United States under Section 7(b) justified? The plain meaning of Section 7(b), its interpretation by the Courts, and application by the Commission, clearly suggests the answer—when licensing non-Federal development will not effectuate or achieve the public benefits that would be made available by Federal development. These benefits cover optimum development of the resource and include power, flood control, fish, navigation, and recreation. This is the clear import of the decision in *National Hells Canyon Ass'n v. F.P.C.*,[85] 237 F. 2d 777 (CADC), cert. den., 353 U.S. 924, where the Court of Appeals observed in pertinent part:

> In order to decide, as required by § 7(b), whether, in its judgment, the development should be undertaken by the United States, the Commission compared the evidence as to the public purposes which would be achieved by the three-dam installation privately proposed, and by the suggested federal high dam advocated by the petitioners. It concluded that "the public purposes such as flood control, navigation and recreation could be effectuated to about the same ex-

[85] Where the Court sustained the Commission's grant of a license for non-Federal development against the contention that it should have recommended construction by the United States under Section 7(b).

tent under either plan of development." This left for consideration and comparison the production of power. (p. 780)

The basic issue before the Commission was succinctly stated by Mr. Justice Frankfurter in the Roanoke Rapids case[86]—"whether a private applicant would adequately develop all the benefits that should be derived from the proposed site." (p. 164)

The same standard is reflected in prior Commission actions. In *Power Authority of the State of New York,* 9 F.P.C. 301, the Commission concluded that the State's original application did not adequately provide for navigation and the distribution of the power benefits. Accordingly, it recommended Federal development.

> We are convinced that this matter should be referred to Congress. The construction of the St. Lawrence Seaway and Power Project and the development of the power potential of the International Rapids Section are vitally important to the economy and defense of the United States and of Canada.

After the defeat in Congress of bills to authorize Federal participation with Canada in the combined seaway and power development and the filing by the Applicant of an amended application to include facilities common to navigation and power, the Commission issued a license for the project (12 FPC 172). Similar action was taken by the Commission in *Fresno Irrigation District et al,* 8 F.P.C. 351; *Virginia Electrict & Power Company,* 10 F.P.C. 4,

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[86] *United States, ex rel. Chapman* v. *F.P.C.,* 345 U.S. 153 (1952) where the Supreme Court rejected the position of the Secretary of the Interior that the Commission was required to recommend construction by the Federal Government and to deny VEPCO's license application because of Congressional approval of a comprehensive plan for development of the Roanoke River Basin.

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Idaho Power Company, 14 F.P.C. 55 and *Alabama Power Company*, 18 F.P.C. 257. In all these cases the Commission indicated

that it would not recommend Federal development if the full economic development of the stream could be accomplished and all public benefits effectuated by the grant of a license.

Congress itself appears to have followed a similar policy in suspending previously enacted authorization for Federal development where subsequent events indicated that public benefits would be adequately provided by the licensee. Thus, Federal construction of the Priest Rapids Dam on the Columbia, the Alabama-Coosa River development, and the Grand River Dam in the Arkansas River Basin, were suspended and non-Federal development licensed under the Federal Power Act (68 Stat. 573, 302, 450).

2. We now turn to the merits of the Secretary's basic contention that adequate public benefits will not be provided if a license is issued. The Secretary does not propose a different site or project. He agrees that High Mountain Sheep should be built—"Taking all resources into account, . . . the High Mountain Sheep Dam on the Snake River represents the optimum development."

He argues, however, that, since all downstream Columbia River plants are Federally owned, maximum sustained public benefits will flow "with the least conflict between use if the project is a part of the Federal system." Coordination of an entire river basin under single ownership and operation is an appealing goal. The facts are, however, that numerous non-Federal projects are now operating in the Columbia River Basin and that coordination has been effected through the Northwest Power Pool and, more re-

cently, the Coordination Agreement.[87] This Agreement goes far beyond the limited downstream coordination proposed by the Secretary. Its effectiveness is attested to by the Administrator of the Bonneville Power Administration:

> In brief, what the treaty requires is that all the generating facilities in the Pacific Northwest will be operated as though they were under a single ownership. The majority of these generating facilities are Federal, but a substantial number are non-Federal. What we do under this agreement is operate these facilities in unison, you might say, or in a coordinated way, to get the maximum production of power from them.
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> In connection with this agreement the United States receives a payment of $1,100,000, representing the net benefits as negotiated which the non-Federal utilities receive from our Federal upstream storage. (Hearings, Subcommittee on Public Works Appropriations, House of Representatives, Part 3 (BPA) 87th Cong., 2d. Sess., p. 668)

Moreover, as emphasized by the Staff, (br. p. 25-28) Federal ownership does not assure coordinated operation or eliminate the necessity for resolving conflicts between the different Federal Agencies involved in water resource activity. These include Army Engineers (navigation and flood control), Bureau of Reclamation (irrigation programs), Bureau of Indian Affairs, Fish and Wildlife Service, Bonneville Power Administration, and others. Coordination between these Federal Agencies is at least as difficult as coordination between Federal and non-Federal

[87] PNPC argues that "the principal obstacle to the execution of the Coordination Agreement in the pact was the reluctance of the managers of the Federal Power System to enter into such agreements." (Supp. br. p. 20)

owners and operators. (Report of the President's Water Resource Policy Commission, Vol. 3, "Duplication and Conflict," p. 508, 9, 569 *et seq.*) As noted by WPPSS:

> . . . the Federal projects in the Columbia Basin are built and operated by several different agencies, under differing statutory authority and standards, pursuing different policies to different objectives—all with the result that there are inevitable and serious conflicts in operation and there is no agency which can finally resolve such conflicts below the office of the President of the United States (if the conflicts do not lie in the underlying statutes) or the Congress (if the conflicts stem from differences in statutory authority.) (WPPSS Supp. br. p. 7.)

Further, the Federal Power Act provides an effective guarantor of cooperation by a licensee in the authority and practice of the Commission under Section 10 of the Act to require coordination with the Northwest Power Pool as a condition of the license (see Article 39, Wells Project No. 2149). The proposed order herein contains such a provision (See article 38).

Accordingly, I conclude that the public interest in the coordination of the High Mountain Sheep project with other projects in the Columbia River Basin will be as fully promoted and protected by the issuance of a license with appropriate conditions as by Federal development. All four organizing companies of PNPC are parties to the Coordination Agreement. High Mountain Sheep was "designed for operation and coordination with the Northwest Power Pool, and the transmission facilities that we build for this project will be designed for integration with the Northwest Power Pool network." (Tr. 146) Moreover, the existing Power Pool

machinery provides for coordination, hydraulically and electrically, with the storage plants of the Federal system so as to provide for maximum prime energy in the system as a whole under periods of critical water flow. As stated by the Commission in *Idaho Power Company*, 14 F.P.C. 55, 67.

> The fact that in Section 7(b) Congress allows the Commission either to set the particular water resources aside for Federal development or to grant a license for development by a non-Federal entity is in itself an affirmative recognition by Congress that it is not in the public interest for the United States to undertake every water-power development that can be made or to reserve such water-power resources exclusively for Federal development merely because they happen to be subject to Federal jurisdiction or even because they happen to be included in a Federal agency's plans for Federal development.

The Secretary also contends that a Federal project will provide for effective fish passage with greater flexibility and ease than a Commission licensee. Both applicants have agreed to install such fishways as may be required and have submitted detailed plans, described earlier, of considerable ingenuity and imagination proposing the expenditure of many millions of dollars toward the solution of this problem. While the Department of Interior's letter of November 21, 1960 also stated that advice as to fishways would be forthcoming at a later date, no such advice has been received. The essential fact is, however, that the Commission will require the installation of any necessary fishways and such modifications as may be required in the future. There is no evidence to support the implication that some-

how Federal construction and operation will provide superior fish passage over non-Federal development. As noted in the brief of the State of Washington Department of Fisheries and Game:

> A further recommendation is made that the High Mountain Sheep Project should be constructed by the Federal Government rather than any other agency because of the relative ease with which facilities for effective fish passage could be incorporated into a Federal project in comparison with the difficulties that would be encountered in a project constructed and operated by a non-federal entity. As fisheries agencies and Intervenors in the fisheries interests, any question as to which of a number of applicants should be licensed to construct a project would normally be beyond the scope of our interest.

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On the other hand, where it is suggested that the interests of the fisheries resource will be best served by issuing a license to one rather than another entity we are concerned that, by silence, our concurrence in this statement would be implied. Because of this possibility it is desirable that we state to the Commission that *the experience of the State of Washington Departments of Fisheries and Game in obtaining fish passage at any particular project does not indicate any basis for the conclusion that better fish passage will result at a project because it is Federally constructed.* As to the facilities to be provided in the event the project is constructed by other than the Federal Government, it is obvious that the Federal Power Commission will designate the fish passage facilities to be provided and, if desirable, could condition the license upon future modifications where necessary.

> Further, it has been the practice for the Commission to consider the recommendations of the State agencies and the Departemnt of Interior in providing fish facilities. *We are therefore unable to conclude, on the basis of experience or otherwise, that construction of the High Mountain Sheep Project by the Federal Government will result in more efficient facilities* as we presume that the Federal Power Commission will act to protect the fisheries in the event the project is not Federally constructed. (emphasis supplied)

Similarly, there is no basis in this record for the suggestion that the public interest in navigation and flood control at High Mountain Sheep would be served better by Federal development. Jurisdiction over navigation and flood control is vested in the Corps of Engineers, not the Department of Interior. The Chief of Engineers has officially advised the Commission that "the scope of the project and purposes served as proposed by the applicant [PNPC] would be substantially the same as those which I proposed . . . It is my view that the project should be operated for flood control as recommended in my proposed report as a part of comprehensive basin development." (FPC Exh. 37) The project as proposed by the applicants meets the needs of flood control and navigation as defined by the Corps of Engineers to the same extent as if constructed by the Federal government. Specific provisions designed to insure compliance with these requirements will be provided in the proposed license.

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The Secretary also contends that Federal construction will result in lower power costs. Presumably, the Secretary is referring to the delivered cost of power rather than the cost of construction. Theoretically, the project and the delivered cost of power should be the same whoever builds

the dam. This is in fact the position of WPPSS. (Supp. br. p. 25) A Federal agency, however, can obtain money cheaper and is free from taxation. Offsetting these factors is the escalation in costs incident to delays in construction and the vicissitudes of annual Congressional action or inaction. The applicants are ready to build on licensing. The Federal government must first begin the long process of time required for engineering, Congressional consideration and approval under circumstances conducive to extended delays.

More importantly, however, the Commission and the Courts have specifically rejected this argument. The Commission stated: (*Idaho Power Co.* 14 F.P.C. 59)

> There is no provision in Section 7(b) or in any other section in the Act which leads us to believe that Congress intended that we recommend Federal development for the sole purpose of making power available at costs lower than would be possible if the same water resources were developed by a private entity under a license. Needless to say if the supplying of power at the lower costs resulting from Federal development should be considered as a decisive factor, there would be few cases involving major power projects where private development could be licensed under the Act because of the substantial difference in annual cost of investment money in favor of Federal over private financing and because of the much higher annual cost of taxes paid under private development as compared with the freedom from taxes under Federal development or, in some instances, the minor annual payments by some Federal projects in lieu of State taxes.

The Court of Appeals concurred pointing out that the alleged lower cost of power from a federally constructed dam is

• • • due to the Government's superior credit and its freedom from taxation. If this were the criterion under § 7(b), federal development would invariably be preferable and the Commission's authority to issue licenses to private applicants could never be exercised without first recommending the proposals for federal construction and waiting to see whether Congress would authorize the work. This would seem

contrary to legislative intent, as § 7(b) requires the Commission to recommend federal development only when "in the judgment of the Commission" the work should be undertaken by the United States itself. The italicized phrase is read out of the statute if the Commission must recommend every development for federal construction simply because the United States has better credit than any private applicant and is free from taxation. (*National Hells Canyon Ass'n* v. *F.P.C.*, 237 F. 2d 777, 781)

Finally, the Secretary argues that Federal construction will avoid the problem of adjustment, offset, or payment due to a non-Federal licensee. The Commission has taken substantial steps to solve the upstream-downstream benefits problem. In its order of July 12, 1962, licensing the Wells Project, No. 2149, on the Columbia River, the Commission stated in pertinent part: "However, in view of Section 10(f) of the Act, the sharing of such benefits [of coordinated operations] would not, of course, include any allowance for benefits which may be realized at Federal projects from upstream storage." The Commission has authority to require the full coordination and operation of licensed projects with other systems.

It is concluded, therefore, that construction and operation of the High Mountain Sheep Project under license by

the Commission will effectuate comprehensive development in the public interest on a comparable basis with Federal development. There is no evidence in this record that Federal development will provide greater flood control, power benefits, fish passage, navigation or recreation; and there is substantial evidence to the contrary.

3. Moreover, in any realistic comparison of Federal with non-Federal construction, the factor of delay must be evaluated. As noted with approval by the Court of Appeals in *National Hells Canyon Ass'n* v. *Federal Power Commission, supra* p. 781 (where it quoted from the Supreme Court's opinion in *U. S. ex rel., Chapman* v. *F.P.C.*, 345 U.S. 153, 169)

> Another consideration influenced the decision of the Commission: the little likelihood that federal development would be authorized in the foreseeable future. "Particularly relevant in this regard", said the Supreme Court in the Roanoke Rapids case, "is the estimate that public development at this site would not in the normal course be undertaken for many years."

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PNPC is ready to build High Mountain Sheep now. It has expended close to $5,000,000, since issuance of a preliminary permit in 1955, on the investigation and engineering leading to its present detailed plans for the High Mountain Sheep project. At no time during this period, in which the Commission has been actively processing the various license applications covering this reach of the river, has the Department of Interior requested authorization to build High Mountain Sheep. It still has not done so. While its latest letter of June 28, 1962, requests that the Commission recommend Federal development to the Congress, the Secretary has not done so. So far as the record discloses, he has not asked the Bureau of the Budget for such au-

thorization, nor has he requested Congressional authorization or approval of a High Mountain Sheep project to be built by the Bureau of Reclamation.

The letter from the Bureau of the Budget to the Secretary of the Army, dated April 11, 1962 (Supp. Staff br., App. E) states in part:

> The Secretary of the Interior expresses the view that authorization of four projects should be deferred pending the results of specific detailed studies by the Departments of the Interior and the Army, and that, at appropriate times, Flathead Lake Outlet Improvement and Penny Cliffs should be recommended for construction by the Corps of Engineers, and High Mountain Sheep (or any alternate) and Garden Valley Division should be recommended for construction by the Bureau of Reclamation.
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> You are also advised that no commitment can be made at this time as to when any estimate of appropriation would be submitted for the recommended projects, if authorized by the Congress, since this would be governed by the President's budgetary objectives as determined by the then prevailing fiscal situation.

In summary, the Secretary is asking the Commission to recommend Federal construction of a project, the details of which have not been engineered or described by the Department of the Interior, and which it has not recommended for construction now to the Administration or to the Congress. Moreover, the Secretary's latest letter of June 28, 1962, proposing Federal development does not indicate any present

intention to press forward for early construction or development.[88] Rather, it is consistent with the objective common to all the prior letters—to reserve this reach of the Middle Snake for future development "at an appropriate time, for construction by the Bureau of Reclamation" (See letter from the Secretary of the Army to the Speaker of the House dated April 25, 1962, App. D). In these circumstances, and in view of the united opposition to Federal development, as evidenced by the briefs filed herein, of local interests in the Pacific Northwest both private and public, it would appear that there is far less likelihood that Federal development would be authorized by the Congress for High Mountain Sheep in the foreseeable future than there was in the Roanoke Rapids or the Hells Canyon cases.

By order dated September 28, 1962, WPPSS' Petition to Reopen the Record, filed July 13, 1962, was referred to the Presiding Examiner for disposition. The petition is denied. The proffered evidence consists primarily of statements made by subordinate Interior Department officials and purports to show that the Secretary's letter of July 26, 1962, does not really represent the Department's position on "the true facts of the progress of the fish-passage research program." (WPPSS pet., p. 3)

The Secretary's letter was received to show his change of position and not as evidence of the success or failure of the Department of Interior's fish research program. WPPSS, along with all other parties, has been afforded ample opportunity to reply to the reasons given by the

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[88] The Staff brief notes that the letter of June 28, 1962, "does not indicate that any legislation has been proposed for authorizing Federal construction . . . or that any such legislation will be sponsored [or] that an appropriation for such construction will be sought." (p. 15)

Secretary for his change of position. Its supplemental brief covers 47 pages. The Department of Interior's fish research program is not in issue here and no useful purpose would be served, nor would it be appropriate, to engage in a premature evaluation of a program which has not been completed, reported, or evaluated by the Department primarily responsible.

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ADDITIONAL FINDINGS AND CONCLUSIONS

Upon consideration of the entire record in this proceeding, including the pleadings, the evidence adduced, and the briefs filed, it is found and concluded, in addition to the findings and conclusions heretofore stated, that:

(1) The Snake River is a navigable river to and above the upper limits of the reservoir of either the High Mountain Sheep or the Nez Perce Projects (*In re Idaho Power Company*, Project No. 1971, Opinion No. 283). The respective project works will be located on lands of the United States, and the reservoirs will inundate lands of the United States (PNPC Application for License, Exhibits F and K, WPPSS Application for License, Exhibit F).

(2) Pacific Northwest Power Company is a private corporation organized under the laws of the State of Oregon as a wholly-owned subsidiary of four sponsoring companies, namely, the Montana Power Company, Pacific Power & Light Company, Portland General Electric Company, and the Washington Water Power Company.

(3) Washington Public Power Supply System is a municipal corporation organized and operating under and by virtue of the laws of the State of Washington, for the purpose of acquiring, constructing, and operat-

ing electrical generating and transmission facilities. It is comprised of 16 public utility districts of the State of Washington, 14 of which are presently participating in financial support for the Nez Perce license application, as are approximately 24 other public utility districts, municipalities, and cooperatives in the Pacific Northwest.

(4) Pacific Northwest Power Company, on March 31, 1958, filed an application under the Federal Power Act for the proposed High Mountain Sheep project (No. 2243), also referred to as the Middle Snake River project, to be located at river mile 189.2 on the Snake River just above the confluence of that river and the Salmon River.

(5) Washington Public Power Supply System, on March 15, 1960, filed an application under the Federal Power Act for the proposed Nez Perce project (No. 2273) to be located at river mile 186.2 on the Snake River just below the confluence of that river and the Salmon River.

(6) Public notice of these proceedings has been given as required by the Act.

(7) On July 24, 1961, WPPSS filed a motion for leave to amend its Nez Perce application to conform to evidence submitted during the course of the hearing including its revisions of designs and specifications. This motion is granted.

(8) On September 12, 1961, WPPSS filed a further motion for leave to amend its Nez Perce license application to include, as an alternative proposal to the Nez Perce project in the event the Commission should decide against licensing the Nez Perce project, the

High Mountain Sheep project as designed by WPPSS. This motion is denied.

(9) The High Mountain Sheep project proposed by PNPC includes an arch dam creating a reservoir about 58 miles long with its normal water surface at elevation 1510, providing a gross storage capacity of 3,600,000 acre-feet, of which 2,250,000 acre-feet is usable, and an initial powerhouse installation of 5 turbines, each of 285,000 horsepower at 550-foot head, totaling 1,425,000 horsepower and 5 generators, each of 175,000 kilowatts rating at 0.95 power factor, totaling 875,000 kilowatts.

(10) The High Mountain Sheep project proposed by WPPSS is located on the Snake River at the same site proposed by PNPC a mile upstream from its confluence with the Salmon River and would include an arch dam creating a reservoir about 58 miles long with its normal water surface of elevation 1510, providing a gross storage capacity of 3,600,000 acre-feet, of which 2,250,000 acre-feet is usable, and an initial powerhouse installation of 6 turbines, each of 290,000 horsepower at 550-foot head, totaling 1,740,000 horsepower and 6 generators, each of 200,000 kilowatts rating at 0.95 power factor, totaling 1,200,000 kilowatts.

(11) The Nez Perce project proposed by WPPSS is located on the Snake River about 2.5 miles below its confluence with the Salmon River and would include an arch dam creating a reservoir about 61 miles long up the Snake River and 36 miles up the Salmon River with its normal water surface of elevation 1510, providing a gross storage capacity of 6,600,000 acre-feet, of which 4,700,000 acre-feet would be usable, and an initial underground powerhouse installation of 10

turbines, each of 290,000 horsepower at 570-foot head, totaling 2,900,000 horsepower and 10 generators, each of 200,000 kilowatts at 0.95 power factor, totaling 1,200,000 kilowatts.

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(12) A comprehensive plan of development of the Columbia River and tributaries has been prepared by the Corps of Engineers, Department of the Army for flood control, navigation, irrigation, power development and other purposes, in report entitled "Water Resources Development, Columbia River Basin, U. S. Army Engineer Division, North Pacific," dated June 1958, as modified in report of Board of Engineers for Rivers and Harbors, dated June 5, 1959, and letter report of the Chief of Engineers, dated March 31, 1961.

(13) The applications for licenses as amended and supplemented by exhibits and testimony are sufficiently complete for an adequate understanding of the projects proposed.

(14) Either the High Mountain Sheep or the Nez Perce project, whichever may be constructed, would be located in or along a navigable water of the United States and would otherwise affect the interests of interstate or foreign commerce.

(15) Project layouts and structural designs for the High Mountain Sheep projects as presented by PNPC and WPPSS and for the Nez Perce project as presented by WPPSS show that either project can be operated satisfactorily for flood control.

(16) The estimated cost of construction, including interest during construction, of the High Mountain

Sheep project as proposed by PNPC in the amount of $190,652,000 is reasonable.

(17) Operation of either project at reservoir elevation 1510 may result in a backwater effect on the Low Hells Canyon development of Project No. 1971 licensed to Idaho Power Company.

(18) After adjustment for possible backwater effect on the Low Hells Canyon development, the gross at-site energy generation by the High Mountain Sheep project proposed by PNPC and WPPSS is 5.20 and 5.72 billion kilowatt-hours of average annual energy, respectively.

(19) The dependable capacity of the Nez Perce project is estimated to be 1,867,000 kilowatts.

(20) The dependable capacity of the High Mountain Sheep project proposed by PNPC and WPPSS is estimated to be 930,000 and 1,218,000 kilowatts, respectively.

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(21) The at-site power value of the power output of the Middle Snake River projects for use in determining value of power benefits for the comparative plans is $11.77 per kilowatt-year and 2.9 mills per killowatt-hour.

(22) The power value at load center of the power output of the Nez Perce project proposed by WPPSS is estimated to be $17.77 per kilowatt-year and 2.37 mills per kilowatt-hour.

(23) The power value at load center of the power output of the High Mountain Sheep project proposed by PNPC is estimated to be $25.91 per kilowatt-year and 3.8 mills per kilowatt-hour.

(24) The High Mountain Sheep project proposed for construction by either PNPC or WPPSS, and the Nez Perce project proposed by WPPSS are economically feasible.

(25) New steam-electric power stations as sources of power supply alternative to the proposed hydroelectric projects would not be as economical for PNPC or WPPSS.

(26) The project structures proposed by PNPC and WPPSS for the High Mountain Sheep project would be safe and stable subject to further consideration and approval of finalized plans as hereinafter provided.

(27) The final design of the High Mountain Sheep arch dam should be verified by an acceptable analysis (such as the trial load method) and reviewed by the use of structural models.

(28) Hydraulic model tests will be necessary for the High Mountain Sheep spillway in order to determine its final design.

(29) There is substantial doubt in the record as to whether the left abutment at the Nez Perce site will safely support the thrust of the proposed arch dam. Further foundation exploration and study of site geology would be required to determine whether or not a safe arch dam can be constructed and to determine the extent of excavation and foundation grouting required.

(30) If we assume for comparative purposes that an arch dam can be constructed at the Nez Perce site, it is reasonable to assume that a safe arch dam can be constructed at the mile 3.7 Lower Canyon Dam site.

However, more extensive geological exploration will be necessary to support any license application for a thin arch dam at the Lower Canyon site. The Lower Canyon mile 0.5 dam site is adequate to support the proposed rockfill dam.

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(31) At a Prehearing Conference held in Washington, D.C., in May 1960, the parties stipulated that the respective alternative projects should be analyzed within what was termed the "common reach," that is the area of the river common to both alternative developments above and below which development projects on the river would be common to both alternative developments. The common reach was defined in this stipulation as extending from the tailwater of the China Gardens project at Snake River mile 172.5, elevation 845, to the normal pool elevation of the Hells Canyon project on the Snake River, elevation 1683 feet m.s.l., and to the normal pool elevation of the future Freedom project on the Salmon River, elevation 1,780 feet m.s.l.

(32) Within the common reach, the resources would be deevloped under the alternative Plans of Development by the following projects: the High Mountain Sheep Plan of Development would comprise the China Gardens project, High Mountain Sheep project, and Lower Canyon project; the Nez Perce Plan of Development would comprise the China Gardens project, the Nez Perce project, and the Whitebird project, the latter at Salmon River mile 58.8 or 59.8.

(33) Designs and cost estimates for all projects in the common reach are presented by PNPC, WPPSS, and the Staff in their respective direct cases. In addition, WPPSS presented completely revised de-

signs and cost estimates for all projects involved in the respective alternative plans at the rebuttal stage of the proceeding, evidence which was excluded initially by the Examiner but was admitted upon ruling by the Commission on September 12, 1961. The Staff also presented, at the rebuttal stage of the proceeding, additional designs and cost estimates for the several projects of the alternative plans in two additional series.

(34) Differences exist in the elevations assigned to China Gardens project by the two Applicants and the Staff. The location and elevation of both High Mountain Sheep and Nez Perce projects are identical in the presentations of both Applicants and the Staff. The Lower Canyon project by PNPC and the Staff presentations is located at Salmon River mile 3.7 and is an arch dam at that location; Lower Canyon project is the WPPSS presentation is located at Salmon River mile 0.5 and is a rock-fill dam. Lower Canyon pool elevation as preesnted by PNPC and by WPPSS in its revised direct case is at reservoir elevation 1,595 feet m.s.l. The Staff pool elevation in its first presentation is at 1.595 feet m.s.l., and in its second preesntation it is at 1.588 feet m.s.l. There are differences in the pool elevation and location of the Whitebird project.

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(35) The variations in locations, heights and installations noted above do not have a significant effect on the potentials of the alternative Plans of Developments. The Applicants herein have agreed between themselves on a common statement of power potentials and annual power benefits resulting from the alternative Plans of Development under several stated

conditions. The statement of annual power benefits is common to all of the variations noted above. The power potentials and annual power benefits are reasonable and are adopted herein.

(36) The Nez Perce development of the Nez Perce Plan would provide 5,015,000 acre-feet of usable storage for flood control, whereas the High Mountain Sheep and Lower Canyon developments of the High Mountain Sheep Plan would provide 5,515,000 acre-feet.

(37) The Nez Perce Plan and the High Mountain Sheep Plan will provide about the same navigation benefits.

(38) Either Plan would provide substantial recreational benefits.

(39) Initially, the High Mountain Sheep Plan of Development would provide 1,767,000 kw of nominal prime energy, 1,307,000 kw of average energy generation and 2,239,000 kw of plant peak capability. At the same point of time, the Nez Perce Plan would provide 1,590,000 kw of nominal prime energy, 1,233,000 kw of average energy generation and 2,092,000 kw of plant peak capability.

Thus, initially, the High Mountain Sheep Plan would have an excess over the Nez Perce Plan of 177,000 kw of nominal prime energy, 74,000 kw of average energy generation, and 147,000 kw of plant peaking capability (Applicants' Joint Statement, Part I, Table 2, Sheet 1). The annual power benefits of the Nez Perce Plan would amount to $53,463,000 annually under initial conditions, and of the High Mountain Sheep Plan $57,436,000 annually, so that the power potential of the High Mountain Sheep Plan would have a greater value, initially, than the Nez Perce Plan of $3,973,000 annually.

(40) At approximately 1985, and prior to the construction of Crevice storage, the High Mountain Sheep Plan would have 1,124,000 kw of norminal prime energy, 1,220,000 of average energy generation and 1,679,000 of plant peak capability. At the same period, the Nez Perce Plan would have 1,039,000 kw of nominal prime energy, 1,156,000 kw of average energy generation and 1,540,000 of plant peak capability. At this period, the High Mountain Sheep Plan power potential would exceed the Nez Perce Plan power potential by 85,000 kw of nominal prime

energy, 64,000 kw of average energy generation and 139,000 kw of plant peak capability (Applicants' Joint Statement, Part I, Table 5, Sheet 1). The power benefits of the High Mountain Sheep Plan will have an average value at this period of $49,644,000 and the power benefits of the Nez Perce Plan would have an average value of $47,004,000. Thus, the High Mountain Sheep Plan's benefits would have a monetary value exceeding the Nez Perce Plan's benefits of $2,640,000 annually.

(41) In the final period, assuming the construction of the Whitebird project and Crevice storage, the High Mountain Sheep Plan would have a potential of 1,326,000 kw of nominal prime enregy, 1,388,000 of average energy generation and 3,556,000 kw of plant peak capability. The Nez Perce Plan for the same period would have 1,302,000 kw of nominal prime energy, 1,386,000 kw of average energy generation and 3,545,000 of plant peak capability. In this case, the excess of the High Mountain Sheep Plan over the Nez Perce Plan would amount to 24,000 kw of nominal prime energy, 2,000 kw of average energy generation and 11,000 kw of plant peak capability

(Applicants' Joint Statement, Part I, Table 4). The Nez Perce Plan would have an average annual value of $61,112,000 and the High Mountain Sheep Plan would have an average annual value of $61,526,000, or an excess for the High Mountain Sheep Plan at this period of $414,000. Accordingly, when final and complete development of all the hydroelectric resources of the Columbia River Basin is achieved, the High Mountain Sheep Plan would have a continuous and permanent excess of value over the Nez Perce Plan of approximately one-half million dollars a year.

(42) The annual flood control benefit of the High Mountain Sheep Plan of Development, without Canadian storage, in the initial period, are $5,340,000 annually, and those of the Nez Perce Plan of Development are $5,300,000 annually. In 1985, again without Canadian storage, they are respectively $6,560,000 annually and $6,500,000 annually. Thus, initially, the High Mountain Sheep Plan has a monetary advantage over the Nez Perce Plan in flood control benefits of $40,000 annually, and by 1985 of $60,000 annually. After the achievement of Canadian storage, the values of the respective plans drop—the High Mountain Sheep Plan being $610,000 annually and the Nez Perce Plan being $560,000 annually. However, the differential between the Plans remains substantially the same, namely, $50,000 annually. Under any circumstances, the High Mountain Sheep Plan will provide greater flood control benefits than the Nez Perce Plan by approximately $50,000 annually.

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(43) In addition to the Nez Perce and High Mountain Sheep developemnts being economically feasible,

Lower Canyon and both China Gardens developments are economically feasible.

(44) PNPC and WPPSS agree on the value of power benefits and annual operation and maintenance costs for the two alternative comparative plans; they do not agree on the construction costs of the several developments comprising the alternate plans.

(45) The cost estimates of the several developments comprising the two alternative plans is influenced by the technique of the cost estimator, site locations, geologic analysis, selection of dam type, foundation excavation assumptions, length and location of spillways, powerhouse location and design, major items of equipment and other structural features.

The range in variation of construction costs (without fish facilities) of the High Mountain Sheep development as presented by the several parties is about 20 percent, of the Nez Perce development about 20 percent, and of the Lower Canyon development about 33 percent.

(46) The effect of locating the Lower Canyon development at mile 0.5 with a rock-fill dam instead of at mile 3.7 with an arch dam is to increase the cost of the High Mountain Sheep Plan by about $48,900,000.

(47) PNPC estimated that its High Mountain Sheep Plan (without fish facilities) would cost $2,575,000 more than its Nez Perce Plan (without Whitebird and fish facilities) (Table 8); WPPSS estimated that its High Mountain Sheep Plan (without fish facilities) would cost $93,036,000 more than its Nez Perce Plan (without Whitebird and fish facilities). The difference is $90,461,000. A large portion of this difference (approximately $48,900,000) is attributable to

WPPSS's adoption of the Lower Canyon development at mile 0.5 and PNPC's adoption of that development at mile 3.7.

(48) The Staff estimates that its High Mountain Sheep Plan (Comparison II, without fish facilities) would cost $49,616,000 more than its Nez Perce Plan (without Whitebird and Fish facilities). However, this comparison does not use the lowest Staff estimate for the High Mountain Sheep Plan, although it does include the lowest of the three Staff estimates for Nez Perce. If the lower Staff estimate for the High Mountain Sheep Plan is used, the differential adverse to High Mountain Sheep is reduced to $13,460,000 ($406,933,000 less $393,473,000). Using Staff estimates, the estimated cost of the High Mountain Sheep Plan ranges between $406,933,000 and $443,089,000. The estimated

cost of the Nez Perce Plan ranges between $393,473,000 and $433,514,000. These estimates are reasonable for comparative purposes.

(49) PNPC will sell the entire output of the project to the four organizing companies of PNPC—Portland General Electric Company, Pacific Power & Light Company, The Montana Power Company, and The Washington Water Power Company. These companies have executed firm commitments to purchase the entire output of the project, paying an annual cost which would equal all annual charges, including financing charges of PNPC, associated with the project. The four organizing companies will have a deficiency of their assured resources as against their estimated load as of the earliest date that High Mountain Sheep project can be expected to be in

service that will equal or exceed the firm capabilities of the High Mountain Sheep project. Consequently, PNPC has demonstrated a need and a market for the output of the High Mountain Sheep project.

(50) WPPSS has failed to establish a need or a market for the output of either Nez Perce or High Mountain Sheep. Its participating public agencies have an assured source of power from their own facilities or from the Bonneville Power Administration until at least 1970. Moreover, the power available to these public agencies from Nez Perce or High Mountain Sheep will be more expensive than Bonneville power.

(51) WPPSS has no binding agreement with any utility to take any part of the Nez Perce power or High Mountain Sheep output.

(52) The power purchase contracts with its four organizing companies will assure to PNPC the payment of all assumed costs, including interest and amortization charges and earnings on the stock. The securities of PNPC will be readily marketable at prices equivalent to good grade utility securities. PNPC has the ability to finance the construction of the High Mountain Sheep project.

(53) WPPSS has failed to prove that it has the ability now to finance the construction of any project that might be licensed to it in this proceeding.

(54) If Canadian storage becomes available prior to High Mountain Sheep power, it will not affect the four sponsor companies' (PNPC) need for additional generating facilities.

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(55) The transmission lines proposed by the Pacific Northwest Power Company would be adequate to

transmit the output of the High Mountain Sheep project to the load centers of the four sponsor companies. The transmission lines proposed by the Washington Public Power Supply System would be adequate to transmit the output of the Nez Perce project to the B.P.A. grid.

(56) The Department of Agriculture has reported that the High Mountain Sheep project would have significant effects upon management and utilization of the resources of the Wallowa, Nez Perce and Payette National Forests, and has recommended several special conditions for the protection and utilization of the Wallowa, Nez Perce and Payette National Forests.

(57) The Department of the Interior has recommended a special condition to assure the feasibility of upstream irrigation developments, and reports that advice as to fishways will be submitted at a later date.

(58) The Chief of Engineers has recommended special conditions for the operation of the project for flood control, a special condition providing for a working agreement between the Licensee and the Corps of Engineers for the operating procedure needed in carrying out the flood control functions of the High Mountain Sheep project, and special conditions in the interest of navigation.

(59) The Departemnt of Interior has requested that the Commission recommend to Congress that the Mountain Sheep Dam should be built by the United States.

(60) The installed horsepower capacity for the High Mountain Sheep project hereinafter authorized is 1,600,000 horsepower for the purpose of computing the administrative annual charge.

(61) The major portion of fish migrating up the Snake River past the Nez Perce site continue their migration up the Salmon River, and are predominantly spring and summer chinook. Fish migrating up the Snake River above the confluence of that river and the Salmon River are predominantly fall chinook, and represent a minor portion of the total fish migrating past the Nez Perce site.

(62) Fish migrating up the Snake River past the confluence of that river and the Imnaha River are now seriously jeopardized by an existing complex of dams immediately above the High Mountain

Sheep Reservoir. The available evidence indicates that the attempt to maintain fish passage past the Brownlee and Oxbow Dams has not been successful.

(63) Significant numbers of fall chinook have been successfully reared in artificial spawning areas. There is no indication that the spring and summer chinook, which are the predominant fish migrating up the Salmon River, have been successfully reared in artificial spawning areas. Because of the size of the fall chinook run, the possibility exists that the run of these fish might be maintained with the aid of some form of transportation upstream and artificial spawning areas.

(64) PNPC's proposal to provide a separate entrance at the High Mountain Sheep project utilizing water only from the Imnaha River has a sound biological basis for anticipating that it will function to pass Imnaha upstream migrants around the reservoir to the Imnaha River.

(65) There is substantial evidence in the record that long and deep reservoirs present a biologic fish passage problem separate and distince from that of designing fish facilities at high dams and that, with the knowledge now available, the Nez Perce project and the Lower Canyon project cannot now be built without constituting a major hazard to migrating fish, particularly the spring and summer chinook and steelhead in the Salmon River, and without risking substantial loss and possible destruction to the anadromous fish passing the site. However, because of a less complex reservoir condition, there is a greater likelihood of success at Lower Canyon than there would be at Nez Perce.

(66) The High Mountain Sheep project does not add substantially to the existing problems of maintaining the run of the main Snake River anadromous run which presently pass the Hells Canyon site, and, because of the special situation in the Imnaha River, there is reason to suppose that the High Mountain Sheep project can be built now without substantial harm to the fishery resources in that river.

(67) Using Staff construction costs (Comparison II) the High Mountain Sheep Plan has greater annual power benefits than the Nez Perce Plan for the initial period without Whitebird and Freedom, but the Nez Perce Plan has greater net annual power benefits than the High Mountain Sheep Plan for subsequent periods of development. Using the lower High Mountain Sheep Plan construction costs originally presented by the Staff,

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the High Mountain Sheep plan is superior to the Nez Perce plan at all stages of development except

the final period when all common reach developments are in with Crevice storage.

(68) The High Mountain Sheep Plan of development is the comprehensive plan of development for this reach of the river under the standards established by Section 10(a) of the Act. It provides for greater power production than does the Nez Perce Plan of development, greater flood control benefits; and it better provides for the preservation and maintenance of existing anadromous fish runs than does the Nez Perce plan of development. It provides greater flexibility in terms of the timing of its component projects and in the provision of alternatives to meet any new developments in fish passage facilities and techniques that may be developed in the future. The High Mountain Sheep project is the project best adapted to such a plan of development.

(69) PNPC has a statutory priority for its application for the High Mountain Sheep project (Project No. 2243) by virtue of a preliminary permit issued by the Commission on April 8, 1955.

(70) WPPSS has failed to establish that it has complied with State laws concerning its right to do business within the States of Oregon and Idaho; or to own or possess property within such States, or to carry on a utility operation within such States, or to have or acquire water rights within such States, or to construct the proposed projects within the States of Oregon and Idaho.

(71) Section 7(a) of the Federal Power Act does not entitle WPPSS as a matter of law to a reasonable time to adapt its conflicting Nez Perce Plan and project application to the High Mountain Sheep

Plan and project application; and on the record made in this proceeding, permission to amend its Nez Perce application so as to seek a license for the High Mountain Sheep project should be denied.

(72) The Application for License for the Middle Snake River project No. 2243 by Pacific Northwest Power Company is granted, subject to the terms and conditions hereinafter set forth.

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Order

Wherefore, It Is Ordered, subject to review by the Commission on appeal, or upon its own motion, as provided in the Commission's Rules of Practice and Procedure that:

(A) This license is issued to Pacific Northwest Power Company (hereinafter referred to as Licensee) under Section 4(e) of the Federal Power Act for a period of 50 years, effective as of the first day of the month in which acknowledgment of acceptance thereof is filed with the Commission by Pacific Northwest Power Company for the construction, operation and maintenance of Project No. 2243, to be known as the High Mountain Sheep project, on the Snake River and its tributaries, Idaho and Oregon, affecting navigable waters of the United States and the interest of interstate or foreign commerce and lands of the United States within and outside of Wallowa, Nez Perce and Payette National Forests, subject to the terms and conditions of the Act which is incorporated herein by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(i) The proposed project consists of:

All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and/or interest in such lands necessary or appropriate for the purposes of the project, whether such lands or interest therein are owned or held by the applicant or by the United States; the general location of such project area being shown and described by certain exhibits which formed part of the application for license, or amendment thereof and which are designated and described as follows:

Exhibit	FPC No.	Showing
J	2243	General Map of Project Area
K (as amended)	2243	Detailed Map of Project Area

(ii) All project works consisting of a concrete arch dam approximately 670 feet high, creating a reservoir extending about 58 miles upstream to Hells Canyon tailwater (Project No. 1971) on the Snake River and about 10 miles upstream on the Imnaha River with normal water surface area of about 17,300 acres and gross storage capacity of

3,600,000 acre-feet at normal water surface elevation 1510, of which 2,250,000 acre-feet would be usable with a drawdown of 173 feet; a chute-type radial-gate controlled spillway; low level intakes; two outdoor type powerhouses, one on each side of the river immediately downstream of the dam, having an initial installation of five

units with each turbine rated 285,000 horsepower at 550-foot head and each generator rated 175,000 kw (184,000 kva at 0.95 power factor); three on the (left bank) Oregon side and two units on the (right bank) Idaho side, with provisions in the plans for the addition of five similar units, two on the left bank and three on the right bank; and appurtenant electrical and mechanical facilities; the location, nature, and character of which are more specifically shown and described by the exhibits hereinbefore cited and by other exhibits which also formed a part of the application for license as amended and which are designated and described as follows:

Exhibit	FPC No.	Showing
L Sheet 30, amended and revised	2243	General Plan
L Sheet 31, amended and revised	2243	Profile and Section
L Sheet 32, amended	2243	Powerhouse Plans
L Sheet 33, amended and revised	2243	Powerhouse cross-sections
L Sheet 34, amended and revised	2243	Intake and Spillway Sections
L Sheet 35, amended and revised	2243	Arch Dam

M: "General Description and Specifications of Equipment regarding High Mountain Sheep project.

(iii) All other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful, in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Commission; also, all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance or operation of the project.

(B) This license is also subject to the terms and conditions set forth in Form L-6, December 15, 1953, (16 FPC 1121) entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and Lands of the United States" which terms and conditions designated as Articles 1 through 27, are attached hereto and made a part hereof, except for Articles 15, 16, 17, 23 and 24 thereof; and subject to the following special conditions set forth herein as additional articles:

Article 28. The Licensee shall commence construction of the High Mountain Sheep project within one year of the effective date of this license, shall thereafter in good faith and with due diligence prosecute such construction; and shall complete the project and place it in operation within six years from the effective date of this license.

Article 29. The Licensee shall submit, in accordance with the Commission's rules and regula-

tions, revised Exhibit L drawings for the project structures. These drawings shall be accompanied by detailed information as to the Licensee's exploration program and excavation plan for the dam, proposed foundation treatment, the design of the arch dam and other major hydraulic structures. The Licensee shall not begin construction of the project works until the Commission approves the exhibit, the proposed program, plans, and designs.

Article 30. The final design of the arch dam shall be verified by an acceptable method of analysis (such as the trial load method) and reviewed by the use of structural models.

Article 31. The final design of the spillway shall be based on hydraulic model tests.

Article 32. The Licensee shall, within one year following the completion of the construction of the project file with the Commission revised Exhibit F and K showing final project boundary prepared in accordance with the Commission's rules and regulations.

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Article 34. The Commission reserves the right to determine at a later date what transmission facilities shall be included in this license as part of the project works.

Article 35. The Licensee shall consult with the Forest Service in determination of the centerline location of transmission lines on or affecting national forest lands and shall secure concurrence of the Forest Service to the specific location of those lines occupying lands administered by the Forest Service.

Article 36. The Licensee shall install additional capacity and make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so, after notice and opportunity for hearing.

Article 37. The Licensee shall not make any claim under the authority of this license against the United States or any water users' organization claiming through the United States for any damage resulting from any future depletion in the flow of the waters of the Snake River and its tributaries for the irrigation of lands and other beneficial consumptive uses.

Article 38. The Licensee shall operate the project and its system in complete coordination with the Northwest Power Pool, shall construct and install, subject to the appropriate approval and consent of the Commission, such transmission facilities as may be required for such operation.

Article 39. The Licensee shall make available to the Idaho State College, upon further order of the Commission at the request of the Idaho State College, reasonable sums of money not to exceed $7,500 for the purpose of undertaking an archeological survey and salvage excavations prior to construction and flooding.

Article 40. The Licensee shall, in order to secure maximum recreational benefits, make every reasonable effort to maintain the water surface of the High Mountain Sheep reservoir at the highest level practicable from June 15 to September 15, of each year, as is consistent with the primary purposes of the reservoir to provide pondage for Licensee's daily, weekly, monthly or seasonal power require-

ments; requirements of downstream releases; and flood control.

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Article 41. The Licensee shall cooperate with the Forest Service in the study and preparation of a recreation public use plan.

Article 42. The road or roads constructed, owned or controlled by the Licensee for the project developments, shall be made available without charge to the Forest Service, its timber operators, permittees, and other users, for the orderly administration, development, and protection of the national forests involved, and for operations necessary and incident to project development, provided that such use may be limited by reasonable safety and traffic control requirements. In appropriate circumstances and as agreed to by the Forest Service, the Licensee may require payment of the user to cover a fair share of the road maintenance costs.

Article 43 The Licensee shall, prior to impounding water, clear all lands in the bottom and margins of the reservoir between a plane five feet below ultimate low water elevation (El: 1337) of the reservoir and the plane at normal pool elevation of the reservoir, and shall cut all brush and trees below the lower plane so that none protrude above elevation 1332. The Licensee shall clear and keep clear to an adequate width lands of the United States along open conduits; and shall dispose of all temporary structures, unused timber, brush, refuse, or inflammable material resulting from the clearing of the lands or from the construction and maintenance of the project works. In addition, all trees along the margin of the reservoir which may die due to opera-

tion of the reservoir shall be removed. The clearing of the lands and the disposal of the material shall be done with due diligence and to the satisfaction of the authorzied representative of the Commission.

Article 44. In the interest of flood control downstream from the project the Licensee shall operate the project in accordance with an agreement to be entered into by the Licensee and the United States Corps of Engineers for the purpose of determining detailed operating procedures for use during flood periods, in accordance with the following principles:

a. The total live storage space of about 2,250,000 acre-feet between elevation 1337 and elevation 1510 mean sea level will be made available for flood control use if and as required.

b. The reservoir level will be no higher than elevation 1475 by 1 March each year to provide about 600,000 acre-feet of storage space for flood control use at that time each year. Additional storage space will be made available between 1 March and the beginning of the flood period to insure the availability on 1 May of the total capacity needed for flood control as estimated by the Corps of Engineers.

c. The space made available as set forth above will be retained until capture of flood flows is requested by the Corps of Engineers, subject to involuntary storage as may be required due to excess of inflows over outlet capacity, or until refilling is authorized by the Corps of Engineers. In the event of involuntary storage during flood control operations, full storage capability will be regained as soon as possible.

d. During the flood storage period controlled outflows will be as warranted by the flood control requirements as determined by the Corps of Engineers with due regard to the requirements for the optimum multiple purpose operation of the project. When the Columbia River discharge at The Dalles is 600,000 c.f.s. or higher, the daily outflows may be reduced to 10,000 acre-feet, except that during years of severe flood conditions, the daily outflow may be reduced to as low as 4,000 acre-feet; below 600,000 c.f.s. discharge at The Dalles, the daily outflow will be determined with due consideration given to all purposes of the project.

e. A discharge capacity of 65,000 c.f.s. at minimum pool elevation 1382 is to be provided by the Licensee. This discharge capacity is based on the gated outlet capacity plus one half of the ultimate turbine hydraulic capacity.

The agreement will be subject to review from time to time as requested by the Licensee or the Corps of Engineers.

Article 45. In the interest of navigation the project shall be operated in accordance with the following requirements:

a. Minimum flow of not less than 13,000 c.f.s. will be maintained at Lime Point, Idaho, during annual storage refill season when determined to be required by the Corps of Enginees in the interest of navigation. Flows of up to 16,500 c.f.s. may be required at other times when determined by the Corps of Engineers to be necessary in the interest of navigation.

b. River fluctuations in the reach between Lewiston and Lime Point resulting from project operation

shall not exceed a rate of one and a half feet per hour on the rising stage, and one foot per hour on the falling stage unless otherwise approved by the Corps of Engineers.

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Article 46. The Licensee shall construct, maintain and operate such protective devices and shall comply with such reasonable modifications of the project structures and operation in the interest of fish and wild-life resources, provided that such modifications shall be reasonably consistent with the primary purpose of the project, as may be prescribed hereafter by the Commission upon its own motion or upon recommendation of the Secretary of the Interior, the Oregon State Game Commission, the Fish Commission of Oregon or the Idaho Department of Fish and Game after notice and opportunity for hearing and upon a finding that such modifications are necessary and desirable and consistent with the provisions of the Act: *Provided further*, That subsequent to approval of the final design drawings prior to commencement of construction no modifications of project structures in the interest of fish and wildlife resources which involve a change in the location, height or main structure of a dam, or the addition of or changes in outlets at or through a dam, or a major change in generating units, or a rearrangement or relocation of a powerhouse or major changes in a spillway structure shall be required.

Article 47. Whenever the United States shall desire, in connection with the project, to construct fish handling facilities or to improve the existing fish handling facilities at its expense, the Licensee

shall permit the United States or its designated agency to use, free of cost, such of Licensee's lands and interests in lands, reservoirs, waterways and project works as may be reasonably required to complete such fish handling facilities or such improvements thereof. In addition, after notice and opportunity for hearing the Licensee shall modify the project operation as may be prescribed by the Commission, consistent with the primary purpose of the project, in order to permit the maintenance and operation of the fish handling facilities constructed or improved by the United States under the provision of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish handling facilities or to relieve the Licensee of any obligation under this license.

Article 48. The Licensee shall prior to beginning of operation of the Low Hells Canyon development of Project No. 1971, enter into an agreement with the Idaho Power Company, Licensee for Project No. 1971, to compensate that Company for backwater effect on the Low Hells Canyon development of Project No. 1971 constructed in accordance with plans approved by the Commission, resulting from the operation of the High Mountain Sheep project with maximum normal pool at elevation 1510 feet at the High Mountain Sheep dam.

In the event no satisfactory agreement is concluded by such time, then upon the application of the Idaho Power Company, the Commission shall fix and determine the compensation to be made by Licensee for such encroachment after notice and opportunity for hearing.

Article 49. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of its upstream and downstream fish passage and handling facilities with those for Project No. 1971 of Idaho Power Company, as the Commission may direct upon recommendation of the Secretary of the Interior, the Oregon State Game Commission, the Fish Commission of Oregon, or the Idaho Department of Fish and Game.

Article 50. The Licensee shall pay to the United States the following annual charges:

(a) For the purpose of reimbursing the United States for the costs of administration of Part I of the Act, a reasonable annual charge in accordance with the provisions of Part 11 of the Commission's regulations. The authorized installed capacity for such purposes is 1,600,000 horsepower.

(b) For the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands exclusive of those used for transmission-line purposes an amount to be fixed hereafter by the Commission; and

(c) For the purpose of recompensing the United States for the use, occupancy and enjoining of its lands for transmission-line purposes an amount to be fixed here after by the Commission.

(C) The exhibits described in paragraph (i) above are approved as part of the license for the project.

(D) The Licensee shall within one year from the effective date of the license, file with the Commission a plan

of financing for Commission approval, and the Commission reserves the right to require such additional information, or such modifications in the proposed plan, as it may deem necessary before taking final action on the plan of financing. Licensee shall not commence construction prior to Commission approval of a plan for financing the project.

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(E) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313(a) of the Federal Power Act, and failure to file such an application shall constitute acceptance of this license. In acknowledgment of the acceptance of this license, it shall be signed for the Licensee and returned to the Commission within 60 days from the date of issuance of this order.

(F) The application of the Washington Public Power Supply System for license for Project No. 2273 is hereby denied.

WILLIAM C. LEVY
Presiding Examiner

27559

APPENDIX A

CHRONOLOGICAL LIST OF WRITTEN PLEADINGS, FILINGS, ORDERS AND RULING IN THE PROCEEDING ON PROJECT NOS. 2243 AND 2273, FROM MARCH 31, 1958

Date	Name	Item

March 31, 1958—PNPC—Application for License (High Mountain Sheep Project No. 2243).

April 18, 1958—National Hells Canyon Association, Inc. and Northwest Public Power Association—Petition for Leave to Intervene—Project No. 2243 (Granted by Commission's order of March 3, 1960)—Motion to Dismiss Application—Project No. 2243.

June 27, 1958—PNPC—Motion to Dismiss National Hells Canyon Association, Inc. and Northwest Public Power Association—Petition to Intervene and Motion to Dismiss of April 18, 1958—Petition for Declaratory Order.

July 23, 1958—National Hells Canyon Association, Inc. and Northwest Public Power Association—Answer in Opposition to Petition for Declaratory Order.

September 28, 1958—PNPC—Notice of Withdrawal of Petition for Declaratory Order.

September 29, 1959—PNPC—Admendment of Motion to Dismiss filed June 27, 1958.

October 26, 1959—Federal Power Commission—Notice of Application for License for Project No. 2243.

November 23, 1959—Idaho Fish and Game Commission and Idaho Fish and Game Department—Petition to Intervene in Project No. 2243 (Intervention Granted by Commission Order of March 3, 1960).

December 1, 1959—Public Utility Commissioner of Oregon—Notice of Intervention filed.

December 2, 1959—Columbia River Salmon & Tuna Packers Association—Petition to Intervene in Project No. 2243 (Intervention Granted by Commission Order of March 3, 1960).

December 2, 1959—Oregon State Water Resources Board—Petition to Intervene in Project No. 2243 (Granted by Commission's Order of March 3, 1960).

27560

Date	Name	Item

December 3, 1959—Public Utility Commissioner of Idaho—Notice of Intervention filed.

December 3, 1959—National Hells Canyon Association, Inc. and Northwest Public Power Association—Amendment to Petition to Intervene filed April 18, 1958—Amendment to Motion to Dismiss Application for Project No. 2243.

December 4, 1959—Oregon State Game Commission and Fish Commission of Oregon; Petition to Intervene in Project No. 2243 (Granted by Commission's Order of March 3, 1960).

December 14, 1959—State of Washington Fisheries Department and State of Washington Game Department—Petition to Intervene in Project No. 2243 (Granted by Commission's Order of March 3, 1960).

December 28, 1959—PNPC—Answer to Amend Motion to Dismiss Application—Memorandum in Support of Answer to Amended Motion to Dismiss.

January 4, 1960—National Hells Canyon Association, Inc. and Northwest Public Power Association—Response to PNPC Answer to Amended Motion to Dismiss and Memorandum in Support.

January 6, 1960—PNPC—Answer to Amended Petition to Intervene by National Hells Canyon Association, Inc. and Northwest Public Power Association.

February 1, 1960—Federal Power Commission—Order Fixing Hearing on Project No. 2243 for March 21, 1960.

March 15, 1960—WPPSS—Application for License for Project No. 2273. Motion for consolidation of proceedings on Project Nos. 2243 and 2273.

March 15, 1960—Federal Power Commission—Notice Postponing Hearing until April 4, 1960.

March 23, 1960—Federal Power Commission—Notice of Application for License for Project No. 2273.

Date	Name	Item

March 28, 1960—PNPC—Answer to Motion for Consolidation Motion to Strike Portion of Motion for Consolidation.

March 30, 1960—Federal Power Commission—Order Consolidation Proceedings, Prescribing Procedure and Fixing Hearing for July 18, 1960.

April 18, 1960—Public Utility Commissioner of Oregon—Notice of Intervention filed.

May 2, 1960—Oregon State Game Commission and the Fish Commission of Oregon—Petition to Intervene in Project No. 2273 (Granted by Commission Order of May 20, 1960).

May 4, 1960—WPPSS—Motion for Extension of Time.

May 4, 1960—Columbia River Salmon & Tuna Packers Association—Petition to Intervene in Project No. 2273 (Granted by Commisison's Order of May 20, 1960).

May 5, 1960—Fishermen's Cooperative Association, Inc.—Petition to Intervene in Project No. 2273 (Granted by Commission's Order of May 20, 1960).

May 6, 1960—Pacific Northwest Power Company—Petition to Intervene in Project No. 2273 (Granted by Commission's Order of May 20, 1960).

May 6, 1960—State of Washington Fisheries Department and State of Washington Game Department—Petition to Intervene in Project No. 2273 (Granted by Commission's Order of May 20, 1960).

May 6, 1960—Northwest Fisheries Association—Petition to Intervene in Project No. 2273 (Granted by Commission's Order of May 20, 1960).

May 9, 1960—PNPC—Answer to WPPSS Motion for Extension of Time.

May 9, 1960—FPC Staff—Answer to WPPSS Motion for Extension of Time.

May 9, 1960—Makah Indian Tribe—Petition to Intervene in Project No. 2273 (Granted by Commission's Order of May 20, 1960).

May 9, 1960—Washington State Sportsmen's Council, Inc.—Petition to Intervene in Project No. 2273 (Granted by Commission's Order of May 20, 1960).

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Date	Name	Item

May 9, 1960—Oregon Wildlife Federation—Petition to Intervene in Project No. 2273 (Granted by Commission's Order of May 20, 1960).

May 9, 1960—Idaho Wildlife Federation—Petition to Intervene in Project No. 2273 (Granted by Commission's Order of May 20, 1960).

May 9, 1960—Association of Pacific Fisheries and Puget Sound Salmon Canners, Inc.—Petition to Intervene in Project No. 2273 (Granted by Commission's Order of May 20, 1960).

May 9, 1960—Idaho Fish and Game Commission—Petition to Intervene in Project No. 2273 (Granted by Commisison's Order of May 20, 1960).

May 10, 1960—WPPSS—Answer to Opposition to Petition to Intervene by PNPC.

May 10, 1960—Pacific Fish Conservation League, Inc.—Petition to Intervene in Project No. 2273 (Granted by Commission's Order of May 20, 1960).

May 11, 1960—Alaska Fishermen's Union—Petition to Intervene in Project No. 2273 (Granted by Commission's Order of May 20, 1960).

May 11, 1960—Oregon State Water Resources Board—Petition to Intervene in Project No. 2273 (Granted by Commission's Order of May 20, 1960).

May 12, 1960—Presiding Examiner—Notice Fixing Date of Prehearing Conference and Extending Time for Filing Until After Conference.

May 16, 1960—Department of Fish and Game of the State of Alaska—Petition to Intervene in Project No. 2273 (Granted by Commission's Order of May 20, 1960).

May 19, 1960—Presiding Examiner—Notice of Prehearing Conference Results and Fixing Date of Hearing for October 17, 1960.

Date	Name	Item

May 26, 1960—Presiding Examiner—Notice of Further Prehearing Conference on Fisheries.

June 13, 1960—Chinook and Cowlitz Indian Nations—Petition to Intervene in Project No. 2273 (Granted by Commission's Order of July 13, 1960).

July 6, 1960—WPPSS—Petition to Intervene in Project No. 2243 (Granted by Commission's Order of October 7, 1960).

July 6, 1960—National Hells Canyon Association, Inc. and Northwest Public Power Association—Petition to Intervene in Project No. 2273 (Granted by Commission's Order of August 16, 1960).

July 12, 1960—PNPC—Answer to Petition to Intervene by National Hells Canyon Association, Inc. and Northwest Public Power Association.

July 13, 1960—Presiding Examiner—Report of Prehearing Conference.

July 15, 1960—Confederated Band and Tribes of the Yakima Indian Nation—Petition to Intervene in Project No. 2273 (Granted by Commission's Order of August 16, 1960).

July 23, 1960—WPPSS Letter requesting PNPC to be directed to use only Docket No. 2243 and not 2173/2243.

August 3, 1960—WPPSS—Motion for Extension of Time.

August 8, 1960—PNPC—Reply to Motion for Extension of Time.

August 8, 1960—FPC Staff—Reply to Motion for Extension of Time.

August 10, 1960—Presiding Examiner—Ruling on Motion for Extension of Time to September 9, 1960 for Applicants filing of Direct Testimony.

August 10, 1960—Presiding Examiner—Ruling on WPPSS Request of July 23, 1960 affirmatively.

August 19, 1960—Oregon State Game Commission and Fish Commission of Oregon—Motion for Extension of Time October 7, 1960 for filing Intervener's Direct Testimony.

Date	Name	Item

August 20, 1960—State of Washington Fisheries Department and State of Washington Game Department—Motion for Extension of Time to October 7, 1960.

August 22, 1960—WPPSS—Amendment to Application for License for Project No. 2273.

August 25, 1960—Department of Conservation, State of Washington—Petition to Intervene in Project Nos. 2243 and 2273 (Granted by Commission's Order of September 16, 1960).

August 26, 1960 PNPC—Reply to Motions for Extension of Time.

September 1, 1960—Oregon State Grange and Washington State Grange—Petition to Intervene in Project Nos. 2243 and 2273 (Granted by Commission's Order of September 16, 1960).

September 2, 1960—Presiding Examiner—Ruling Granting Extension of Time for filing Staff and Intervener's Direct Testimony to October 7, 1960, and setting Hearing for November 4, 1960.

September 6, 1960—Idaho Fish and Game Commission, Washington State Sportsmen's Council, Inc., Pacific Fish Conservation League, Inc., Fishermen's Cooperative Association, Inc., Northwest Fisheries Association, Alaska Fishermen's Union and Makah Indian Tribe—Join in Petition for Extension of Time for Filing of Intervener's Direct Testimony to October 7, 1960.

September 14, 1960—PNPC—Answer in Opposition to Petition of Oregon State Grange and Washington State Grange.

September 20, 1960—Presiding Examiner—Order Postponing Prehearing Conference to October 31, 1960.

September 21, 1960—Oregon State Grange and Washington State Grange—Reply to PNPC Answer.

September 27, 1960—State of Oregon—Statement of Official Position of State of Oregon Filed.

Date	Name	Item

September 28, 1960—Presiding Examiner—Examiner's Notice Prescribing Agenda.

October 3, 1960—National Hells Canyon Association, Inc. and Northwest Public Power Association—Motions to Vacate Orders of Intervention.

October 12, 1960—PNPC—Answer to Motion by National Hells Canyon Association, Inc. and Northwest Public Power Association.

October 17, 1960—Federal Power Commission—Order vacating Order of March 3, 1960 Granting Intervention by National Hells Canyon Association, Inc. and Northwest Public Power Association.

October 18, 1960—Presiding Examiner—Notice to File motions to Strike Exhibits by October 31, 1960.

October 20, 1960—WPPSS—Notice of and Application for taking of depositions of FPC Staff members—Application for Issuance of Subpoenas for Appearance of FPC Staff members.

October 25, 1960—FPC Staff—Reply to Applications for Depositions and Subpoenas.

October 26, 1960—Presiding Examiner—Ruling Denying Application for Depositions and Subpoenas.

October 27, 1960—WPPSS—Motion for Continuance of Hearing to January 9, 1961.

October 31, 1960—Chinook and Cowlitz Indian Nations—Motion to set date for Examination of Witnesses.

November 1, 1960—Presiding Examiner—Report on Prehearing Conference.

November 2, 1960—FPC Staff—Reply in Opposition to WPPSS Motion to October 27, 1960 for Continuance.

November 3, 1960—WPPSS—Appeal from Presiding Examiner's Ruling Denying Application for Depositions and Subpoenas—Answer in Opposition to Chinook and Cowlitz Indian Nations for Fixing of Date for Examination of Witnesses.

November 3, 1960—WPPSS—Application for Issuance of Subpoena of PNPC records.

*November 2, 1960—PNPC—Reply in Opposition to WPPSS Motion of October 27, 1960 for Continuance.

Date	Name	Item

November 4, 1960—Presiding Examiner—Denial of WPPSS Motion for Continuance (See Tr. 125, Part 1 of Volume I of Transcript).

November 4, 1960—WPPSS—Motion on record for reconsideration of denial of Motion for Continuance (See Tr. 125-140 for Motion and Replies of Parties to Motion).

November 4, 1960—Presiding Examiner—Ruling Denying Motion for Reconsideration of Motion for Continuance (See Tr. 140, Part 1 of Volume I).

November 4, 1960—WPPSS—Motion for week's (Stay) Continuance (See Tr. 140, Part 1 of Volume I).

November 4, 1960—Presiding Examiner—Ruling Denying Motion for Week's (Stay) Continuance.

November 7, 1960—WPPSS—Appeal from Presiding Examiner's Ruling Denying Motion for Continuance and Motion to Stay.

November 7, 1960—WPPSS—Motion Requesting the Commission to Stay Resumption of Hearing on Nov. 7, 1960.

November 7, 1960—Federal Power Commission—Order Denying Motion for Stay.

November 9, 1960—FPC Staff—Memorandum in Opposition to WPPSS Appeal of Examiner's Ruling of October 26, 1960.

November 15, 1960—PNPC—Answer to WPPS Appeal of Examiner's Rulings of November 4, 1960.

November 22, 1960—FPC Staff—Memorandum in Opposition to WPPSS Appeal of Examiner's Rulings of November 4, 1960.

November 22, 1960—WPPSS—Motion for Leave to File Response to PNPC Answer to Appeal.

November 25, 1960—Federal Power Commission—Order Sustaining Presiding Examiner's Rulings Appealed by WPPSS on Applications for Depositions and Subpoenas.

Date	Name	Item

November 25, 1960—Federal Power Commission—Order Sustaining Presiding Examiner's Rulings Appealed by WPPSS on Motion for Stay and Continuance.

December 1, 1960—Columbia River Salmon & Tuna Packers Association—Motion to Change Place of Hearing to Portland, Oregon.

December 2, 1960—Presiding Examiner—Amended Schedule of Witnesses Superseding Schedule Issued November 1, 1960.

December 13, 1960—Department of Conservation, State of Washington Application for Authorization for Taking Deposition of R. Wayne Lincoln.

December 16, 1960—Public Utility Commissioner of Idaho—Request for Change of Schedule Appearance of Witness.

December 19, 1960—WPPSS—Reply in Opposition to Interveners' Motion for Change in Place of Hearing.

December 23, 1960—Presiding Examiner—Notice of Authorization of Taking of Deposition of R. Wayne Lincoln.

December 27, 1960—Washington State Sportsmen's Council, Inc.—Petition for Amending of Schedule of Witness.

December 27, 1960—Washington State Sportsmen's Council, Inc., Pacific Fish Conservation League, Inc., Fishermen's Cooperative Association, Inc., Northwest Fisheries Association, Alaska Fishermen's Union, Makah Indian Tribe, Oregon Wildlife Federation, Idaho Wildlife Federation—Join in Motion of December 1, 1960 for Change in Place of Hearing.

December 28, 1960—Chinook and Cowlitz Nations of Indians—Join in Motion of December 1, 1960 for Change in place of Hearing.

January 4, 1961—WPPSS—Reply in Opposition to Motion Schedule of Witnesses.

January 4, 1961—WPPSS—Petition for Declaratory Order Regarding Fishways.

Date	Name	Item

January 9, 1961—State of Washington Fisheries Department and State of Washington Game Department—Join in Motion for Change in Place of Hearing.

January 16, 1961—Idaho Fish and Game Commission—Join in Motion for Change in Place of Hearing.

January 17, 1961—PNPC—Reply to Petition January 4, 1961 for Declaratory Order.

January 31, 1961—Presiding Examiner—Ruling Changing Place of Hearing to Portland, Oregon on March 31, 1961.

February 6, 1961—WPPSS—Supplement to Petition and Motion for Declaratory Order.

February 6, 1961—WPPSS—Appeal from Presiding Examiner's Denial of Motion of WPPSS to Strike Fishery Testimony. (Note the original motion was filed October 17, 1960, as part of the motions to strike as provided for by the Commission's Order of March 30, 1960. The Presiding Examiner's Denial of the original motion appears at Tr. 118 through 123, Volume I, part 1 of the transcript).

February 10, 1961—WPPSS—Application for Issuance of Subpoenas.

February 13, 1961—Presiding Examiner—Report on Application for Subpoenas.

February 14, 1961—WPPSS—Supplement to Application for Subpoenas.

February 23, 1961—Federal Power Commission—Order Sustaining Presiding Examiner's Ruling of February 9, 1961, Denying Application for Subpoenas (For ruling made in the course of the hearing see Tr. 7211, Volume 46 of the transcript).

February 23, 1961—Presiding Examiner—Notice Requiring Filing of Rebuttal Testimony by April 5, 1961.

March 7, 1961—Federal Power Commission—Order Sustaining Presiding Examiner's Ruling Denying Motion to Strike Fishery Testimony.

Date	Name	Item

March 30, 1961—WPPSS—Motion for Continuance to June 12, 1961.

April 3, 1961—PNPC—Reply to Motion for Continuance—Motion to Dismiss WPPSS Motion for Continuance.

April 10, 1961—WPPSS—Supplementary Motion for Continuance.

April 14, 1961—Federal Power Commission—Order Referring WPPSS Motions for Continuance to Presiding Examiner.

April 18, 1961—Presiding Examiner—Ruling Denying WPPSS Motion for Continuance and Extending Time for Filing of Rebuttal Testimony to April 21, 1961.

April 24, 1961—WPPSS—Motion for Leave to File Amendment to Application for Project No. 2273 to include a project at High Mountain Sheep site.

April 25, 1961—FPC Staff—Reply in Opposition to WPPSS Motion for Leave to Amend its Application to Include Project at High Mountain Sheep site.

April 26, 1961—PNPC—Motion to dispense with rebuttal testimony (See Tr. 9800-9802, Volume 66).

May 1, 1961—WPPSS—Motion for Leave to File Reply to Staff Answer to WPPSS Motion to Amend Application for License. —Reply in Opposition to Motion of PNPC of April 26, 1961.

May 2, 1961—Presiding Examiner—Ruling Denying WPPSS Motion to Amend Application and Denying PNPC Motion to Dispense with Rebuttal Testimony, and Recessing Hearing Until June 12, 1961 at which Time Hearing to Proceed According to Agreement of Parties Set Forth at Tr. 9823, Volume 66.

May 12, 1961—WPPSS—Objections to Presiding Examiner's Ruling of May 2, 1961.

27570

Date	Name	Item

May 19, 1961—Federal Power Commission—Order Approving Examiner's Continuance of Hearing for more than 30 days and Sustaining Denial of Motion of Leave to File Amended Application.

June 20, 1961—WPPSS—Petition for Rehearing of Commission's Order of May 19, 1961, Denying Motion for Leave to File Amended Application.

June 29, 1961—PNPC—Answer in Opposition to WPPSS Petition for Rehearing.

July 20, 1961—Federal Power Commission—Order Denying Motion for Reconsideration.

July 21, 1961—FPC Staff—Motion for Reversal Ruling of Presiding Examiner Denying Motion of Staff Counsel made on the Record July 21, 1961 at Tr. 13781, Volume 94, that certain evidence offered in rebuttal and excluded be admitted.

July 24, 1961—PNPC—Reply to Staff Motion for reversal of Presiding Examiner's ruling on testimony offered in rebuttal.

July 24, 1961—WPPSS—Motion Appealing Presiding Examiner's Ruling on Motion of Staff Counsel.

July 24, 1961—WPPSS—Motion to Amend License Application and for Order Declaring License Amended.

July 25, 1961—Federal Power Commission—Order on Motions Appealing Ruling of Presiding Examiner on Testimony offered in rebuttal, setting aside Presiding Examiner's Ruling.

July 26, 1961—Presiding Examiner—Ruling Reopening Proceedings and Setting September 12, 1961 as date for admitting previously excluded testimony as rebuttal.

August 7, 1961—PNPC—Petition for Reconsideration of Commission's Order of July 25, 1961, setting aside Presiding Examiner's Ruling.

August 25, 1961—Federal Power Commission—Order Denying PNPC Petition for Reconsideration.

27571

Date	Name	Item

September 12, 1961—WPPSS—Motion to Strike portions of testimony and related exhibits by witness for PNPC from record.

September 12, 1961—WPPSS—Motion to Amend License Application to conform to exhibits and testimony of record pertaining to designs and cost estimates of High Mountain Sheep Project.

October 5, 1961—WPPSS—Memorandum in support of motion of Staff Counsel to Strike certain testimony made at hearing.

November 13, 1961—WPPSS—Motion for Extension of Time to 1/15/62 for filing applicants' briefs and for similar 30 days extension of filing all other briefs.

November 15, 1961—WPPSS—Motion to Rule on Motion of Staff Counsel to strike certain testimony made at hearing.

November 21, 1961—Presiding Examiner—Ruling issued Extending Time for Filing Briefs.

November 30, 1961—Presiding Examiner—Ruling Striking Testimony of Witnesses Perry and Pressey at hearing, pursuant to motion filed 11/15/61.

January 4, 1962—WPPSS—Motion for Leave to Substitute Complete Copy of order of Director of Conservation, State of Washington, dated 7/7/61, for incomplete copy thereof appended to motion filed 9/12/61, together with substitute copy of said order.

January 15, 1962—WPPSS—Initial brief, together with introductory material, joint exhibit and Joint Statement.

January 15, 1962—Applicant's brief, together with suggested findings of fact and supplement to brief.

January 15, 1962—PNPC, WPPSS Staff Counsel—Motion to reopen record and admit additional evidence.

Date	Name	Item

January 15, 1962—PNPC, WPPSS—Motion to Reopen Record and admit additional evidence.

January 29, 1962—WPPSS, PNPC, STAFF COUNSEL—Motion to Reopen Record and admit additional evidence.

March 1, 1962—State of Washington Department of Conservation—Brief.

March 1, 1962—Idaho Wildlife Federation—Brief.

March 1, 1962—Fishing and Game Agencies for States of Idaho, Oregon and Washington—Consolidated brief.

March 1, 1962—Staff Counsel—Brief.

March 2, 1962—Chinook & Cowlitz Nations—Telegram requesting extension of time of 40 days in which to file briefs and findings.

March 2, 1962—Oregon Public Utilities Commission—Initial Brief.

March 2, 1962—Washington State Sportsmen's Council, Inc.; Oregon Wildlife Federation; Fishermen's Cooperative Association, Inc.; Northwest Fisheries Association; Alaska Fishermen's Union; Pacific Fish Conservation League; Makah Indian Tribe—Consolidated brief.

March 2, 1962—Columbia River Salmon & Tuna Packers Association—Brief.

March 5, 1962—Idaho Public Utilities Commission—Brief.

April 2, 1962—PNPC—Reply brief.

April 2, 1962—WPPSS—Reply Brief.

April 11, 1962—PNPC—Motion to Strike certain material from initial brief of WPPSS filed 1/15/62.

April 23, 1962—WPPSS—Answer to Motion filed 4/11/62.

June 11, 1962—PNPC—To Strike the Reply Brief (as amended June 15, 1962) of WPPSS.

Date	Name	Item

June 19, 1962—PNPC—Amendment to Motion to Strike.

June 28, 1962—Secretary of Interior Supplemental Report.

June 28, 1962—WPPSS—Answer to Motion filed 6/11/62.

July 6, 1962—Order opening record for purpose of including letter of Secretary of Interior filed 6/28/62 as statement of his position; and within 20 days from date of issuance hereof parties may file supplemental brief with respect to said letter (Exh. 43-A).

July 6, 1962—Copy of letter of Secretary of Interior filed 6/28/62 sent to parties of record.

July 13, 1962—WPPSS—Petition to Reopen Record to Include Additional Documents.

July 23, 1962—Staff Counsel's answer to petition to reopen record.

July 23, 1962—Columbia River Salmon & Tuna Packers Association supplemental brief.

July 24, 1962—PNPC—Answer to Petition to Reopen Record.

July 26, 1962—Staff Counsel supplemental brief.

July 26, 1962—State of Washington; Department of Fisheries and Department of Game—Supplemental brief.

July 26, 1962—WPPSS—Supplemental brief.

July 27, 1962—PNPC—Supplemental brief.

July 27, 1962—Washington State Sportsmen's Council, Inc. *et al.* —Supplemental brief.

July 27, 1962—State of Washington, Department of Conservation —Supplemental brief.

July 30, 1962—Oregon Public Utility Commissioner—Supplemental brief.

August 2, 1962—Notice Extending Time to July 30, 1962 for filing briefs.

August 31, 1962—WPPSS—Amendment to Petition to Reopen Record filed July 13, 1962 to Request Stay of Issuance of Decision.

September 11, 1962—Staff Counsel's Reply to Amendment.

September 28, 1962—Commission's Referral of Motion to Reopen Record to Presiding Examiner.

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APPENDIX C

Economic Feasibility of Projects Proposed for Construction by PNPC and WPPSS - Projects Nos. 2243 and 2273

	Nez Perce Project No. 2273		High Mountain Sheep Project No. 2273 WPPSS Financing		High Mountain Sheep Project No. 2243 PNPC Financing		
	WPPSS Analysis	FPC Analysis	WPPSS Analysis	FPC Analysis	PNPC Analysis	FPC Analysis	
Exhibit Reference	WPPSS Exs. 55, 148, 161 and 162 FPC Exs. 18, 20 and 22		WPPSS Exs. 271 and 268 FPC Exs. 20 and 82 Table 1A, Joint Ex. Pt. I		PNPC Exs. 22 and 23, 24 and 41 FPC Exs. 17, 19, 21 and 32		
Initial Installation - Nameplate Kilowatts	2,000,000	2,000,000	1,200,000	1,200,000	875,000	875,000	1,200,000
Ultimate Installation - Nameplate Kilowatts	3,200,000	3,200,000	2,000,000	2,000,000	1,750,000	1,750,000	2,000,000
Output and Annual Value							
At Site							
Dependable Capacity - Kilowatts	1,850,000	1,867,000	1,218,000	1,261,000	922,000	930,000	1,261,000
Unit Value	$11.77		$11.77	$11.77			
Total Value	$ 21,775,000		$ 14,336,000	$ 14,842,000			
Energy - 1,000,000 kwh	9417	8532	5720	5283	5483	5195	5283
Unit Value	$.0029		$.0029	$.0029			
Total Value	$ 27,309,000		$ 16,588,000	$ 15,321,000			
Total Annual Value - At Site	$ 49,084,000		$ 30,924,000	$ 30,163,000			
At Load Center							
Dependable Capacity - Kilowatts		1,753,000			857,000	865,000	1,171,000
Unit Value		$17.77			$22.01	$25.91	$25.91
Total Value		$ 31,151,000			$ 18,863,000	$ 22,412,000	$ 30,341,000
Energy - 1,000,000 kwh		8191			5187	4914	5002
Unit Value		$.00237			$.00279	$.0038	$.0038
Total Value		$ 19,413,000			$ 14,472,000	$ 18,673,000	$ 19,008,000
Total Annual Value - At Load Center		$ 50,564,000			$ 33,335,000	$ 41,085,000	$ 49,349,000
Annual Cost							
Project Cost	$391,080,000 5/	$369,120,000 1/,5/	$213,000,000 5/	$229,743,000 1/,5/	$257,100,000 6/	$253,699,000 6/	$ 286,304,000
Cost of Money - Percent	4.75	4.5	4.5	4.5	6.0	6.0	6.0
Fixed Charges	21,707,000 2/	23,523,000 4/,7/	11,417,000 9/	15,416,000 5/,8/	24,580,000 6/	18,627,000 4/	21,232,000
O and M - Production	2,965,000	2,280,000 4/	2,175,000	1,536,000	1,020,000 6/	1,181,000 4/	1,727,000
O and M - Fish Facilities	750,000	750,000	454,000	290,000	480,000	380,000	380,000
A and G Expense	1,310,000	798,000 4/	792,000	538,000	525,000 3/	413,000 4/	545,000
Transmission Cost	-	6,707,000	-	-	-	7,336,000	8,382,000
Total Annual Cost	$ 26,732,000	$ 34,058,000	$ 14,838,000	$ 17,870,000	$ 26,605,000	$ 27,937,000	$ 32,266,000
Excess of Value Over Cost	$ 22,352,000	$ 16,506,000	$ 16,086,000	$ 12,293,000	$ 6,730,000	$ 13,148,000	$ 17,083,000

1/ Table 1
2/ 26,732 - (2965 + 750 + 1310) WPPSS Ex. 162
3/ (1020 + 480) .35
4/ Production plant only.
5/ Project cost including step-up substation.

6/ Includes transmission line to load centers.
7/ 350,670,000 x .0671 (Table 1 and FPC Ex. 20)
8/ 229,743,000 x .0671 (Table 1 and FPC Ex. 20)
9/ 10,778,000 + 426,000 + 213,000 (WPPSS Ex. 271, sh. 6)

O and M - Operation and Maintenance
A and G - Administrative and General Expense

APPENDIX D

Summary of Installed Capacity and Construction and Annual Costs
Comparative Plans for Development of Middle Snake River

	High Mountain Sheep Plan				Nez Perce Plan					Difference between High Mountain Sheep Plan and Nez Perce Plan	
	High Mountain Sheep	Lower Canyon	China Gardens	Total	Nez Perce	China Gardens	Subtotal	Whitebird	Total	w/o Whitebird	With Whitebird
Installed Capacity - 1,000 kw											
FPC											
Direct											
Installed Capacity	1,225	700	255	2,180	1,815	195	2,010	52	2,062	170	118
Reservoir Elevation	1,510	1,595	945		1,510	920		1,575			
Comparison I and II											
Installed Capacity 1/	1,200	800	237	2,237	2,000	198	2,198	70	2,268	39	-31
Installed Capacity 2/	1,200	910	237	2,347	2,000	198	2,198		2,268	149	79
Reservoir Elevation	1,510	1,588	941		1,510	920		1,575			
PNPC (Direct)											
Installed Capacity	1,225	700	255	2,180	1,815	195	2,010	52	2,062	170	118
Reservoir Elevation	1,510	1,595	945		1,510	920		1,575			
WPPSS (Rebuttal)											
Installed Capacity	1,200	910	205	2,315	2,000	170	2,170	65	2,235	145	80
Reservoir Elevation	1,510	1,595	925		1,510	905		1,570			
Construction Costs $1,000 3/											
Without Fish Facilities											
FPC											
Direct	$188,068	$148,474	$ 70,391	$ 406,933	$338,412	$ 57,481	$395,893	3/		$ -11,040	
Comparison I	220,766	175,014	68,465	464,245	370,169	63,345	433,514	3/		-30,731	
Comparison II 1/	205,453	162,871	68,465	436,789	330,128	63,345	393,473	3/		-43,316	
Comparison II 2/	205,453	169,171	68,465	443,089	330,128	63,345	393,473	3/		-49,616	
PNPC (Direct)	183,706	148,719	73,248	405,673	342,058	61,040	403,098	$38,592	$441,690	-2,575	$ 36,017
WPPSS (Rebuttal)	197,163	197,126	66,000	460,289	308,253	59,000	367,253	3/		-93,036	
Fish Facilities											
FPC											
Direct	22,918	20,500	12,500	55,918	43,900	9,600	53,500	1,036	54,536	-2,418	-1,382
Comparison I	15,390	29,008	12,535	56,933	46,684	10,028	56,712	1,107	57,819	-221	886
Comparison II	15,390	29,008	12,535	56,933	49,494	10,028	59,522	1,107	60,629	2,589	3,696
WPPSS (Rebuttal)	15,837	34,874	11,000 4/	61,711	37,747	8,500 4/	46,247	948	47,195	-15,464	-14,516
With Fish Facilities											
FPC											
Direct	210,986	168,974	82,891	462,851	382,312	67,081	449,393	26,963	476,356	-13,458	13,505
Comparison I	236,156	204,022	81,000	521,178	416,853	73,373	490,226	18,968	509,194	-30,952	-11,984
Comparison II 1/	220,843	191,879	81,000	493,722	379,622	73,373	452,995	18,968	471,963	-40,727	-21,759
Comparison II 2/	220,843	198,179	81,000	500,022	379,622	73,373	452,995	18,968	471,963	-47,027	-28,059
WPPSS (Rebuttal)	213,000	232,000	77,000	522,000	346,000	67,500	413,500	15,500	429,000	-108,500	-93,000

1/ Lower Canyon installed capacity 800 Mw (WPPSS original plan) and reservoir at elevation 1588.
2/ Lower Canyon installed capacity 910 Mw (WPPSS rebuttal plan) and reservoir at elevation 1595.
3/ Omitted since part of Whitebird costs charged to Nez Perce fish facilities.
4/ Table 4, sheet 4.
5/ From Table 4.

Note: Plus (+) designates difference in favor of High Mountain Sheep Plan, minus (-) designates difference in favor of Nez Perce Plan.

APPENDIX E

Summary of Economic Comparisons
Comparative Plans for Development of the Middle Snake River
(Amounts in $1,000)

Assumptions of Levels of Development		FPC			PNPC			WPPSS		
		Difference in Annual Cost between HMSP and MPP 1/	Difference in Annual Value between HMSP and MPP 2/	Net Difference between Annual Cost and Value	Difference in Annual Cost between HMSP and MPP 1/	Difference in Annual Value between HMSP and MPP 2/	Net Difference between Annual Cost and Value	Difference in Annual Cost between HMSP and MPP 1/	Difference in Annual Value between HMSP and MPP 2/	Net Difference between Annual Cost and Value
Initial Period - Common Reach Developments Without Whitebird & Freedom	Without Fish Fac.	$ -3,345 3/	$3,973	$ 628	$ -805	$3,973 (Table 2) 2/	$ 3,168	$ -5,653	$3,973	$ -1,680
	With Fish Fac.	-3,201 3/	3,973 (Table 2) 2/	772				-6,657	3,973 (Table 2) 2/	-2,684
Subsequent Period - Common Reach Developments Without Whitebird & Freedom; No Crevice Storage	Without Fish Fac.	-3,345 3/	2,640	-705	-805	2,640 (Table 5) 2/	1,835	-5,653	2,640	-3,013
	With Fish Fac.	-3,201 3/	2,640 (Table 5) 2/	-561				-6,657	2,640 (Table 5) 2/	-4,017
Subsequent Period - All Common Reach Developments; No Crevice Storage	Without Fish Fac.				1,461	1,167 (Table 3) 2/	2,628			
	With Fish Fac.	-1,954 3/	1,167 (Table 3) 2/	-787				-5,608	1,167 (Table 3) 2/	-4,441
Subsequent Period - All Common Reach Developments; With Crevice Storage	Without Fish Fac.				1,461	414 (Table 4) 2/	1,875			
	With Fish Fac.	-1,954 3/	414 (Table 4) 2/	-1,540				-5,608	414 (Table 4) 2/	-5,194

1/ From Table 8, using Stipulated O & M and A & G.
2/ From Applicants' Joint Statement, Part J.
3/ Comparison II with Lower Canyon at Elev. 1595 and 910,000 kilowatt capacity.

Note: Plus (+) designates difference in favor of High Mountain Sheep Plan (HMSP), minus (-) designates difference in favor of Nez Perce Plan (NPP).

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Project No. 2243
PACIFIC NORTHWEST POWER COMPANY

Project No. 2273
WASHINGTON PUBLIC POWER SUPPLY SYSTEM

Errata Notice

(October 17, 1962)

PRESIDING EXAMINER'S DECISION UPON COMPETING APPLICATIONS FOR LICENSE UNDER SECTION 4(E) OF THE FEDERAL POWER ACT

(Issued October 8, 1962)

Page 14 Lines 5 and 6—"... in less than 10 days before the date set for the commencement of the hearing ... (Rule 1.8(d))" should read"... within five days next preceding the commencement of or during a hearing ... (Rule 1.11(a))"

Page 14 Line 11—"compliances" should read "compliance"

Page 45 Line 19—"reasonable," should read "reasonably"

Page 75 Line 30—"part" should read "party"

Page 97 Line 42—"1,200,000" should read "2,000,000"

Page 105 (60) Line 2—"1,600,000" should read "1,167,000"

Page 108 (A)(i)—Delete "K (as amended) 2243 Detailed Map of Preject Area"

Page 109 Last two lines—"M: 'General Description and Specifications of Equipment' regarding High Mountain Sheep project." should read "M: Amended. 'General

Description and Specifications of Equipment' regarding High Mountain Sheep project in two sheets."

Page 115 Article 50. (a), Line 6—"1,600,000" should read "1,167,000"

WILLIAM C. LEVY
Presiding Examiner

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[Filed Dec. 3, 1962]

BEFORE THE
FEDERAL POWER COMMISSION

In the Matter of

Project No. 2243
PACIFIC NORTHWEST POWER COMPANY

Project No. 2273
WASHINGTON PUBLIC POWER SUPPLY SYSTEM

Petition of Stewart L. Udall, Secretary of the Interior, for Intervention

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FRANK J. BARRY
Solicitor of the
Department of the Interior

EDWARD W. FISHER
EDWARD WEINBERG
HARRY J. HOGAN
LEON JOUROLMON

Counsel for the
Secretary of the Interior

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STEWART L. UDALL, Secretary of the Interior, files this Petition for Intervention in the above-styled proceeding, and as grounds for intervention shows to the Commission:

1. He is head of the Department of the Interior, one of the executive departments of the United States Government. In that capacity he has broad responsibilities in regard to the marketing of electric power in the Northwest, in the making of comprehensive plans for the development of land and water resources including the investigation, construction and operation of federal reclamation projects, in the administration of public lands, in the preservation and propagation of fish and wildlife resources, and in related matters. Such responsibilities are of great importance to the economy and welfare of the Northwest and of the United States and its citizens, cannot be adequately protected by any existing party in the proceeding, and require protection by his intervention in this proceeding.

2. He protests the granting of a license to the applicant,

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PACIFIC NORTHWEST POWER COMPANY, for the construction of the High Mountain Sheep Project, and likewise, the granting of a license to the applicant, WASHINGTON PUBLIC POWER SUPPLY SYSTEM, for the construction of the Nez Perce Project, or any alternative therefor; and instead thereof he urges that the Federal Power Commission now recommend the development at an appropriate time of High Mountain Sheep Dam by the United States.

3. Federal development of High Mountain Sheep Dam is necessary not only in order to provide generation and as a major storage facility but also in order to achieve maximum coordination with the federal generation and storage

facilities system-wide in the Northwest and particularly with the federal dams already or to be constructed on the Snake and Columbia Rivers below the site of High Mountain Sheep Dam; in the event that federal construction is not accomplished, as a minimum, any nonfederal license should include a provision requiring complete coordination with the Pacific Northwest Federal Power System at no cost to the United States.

The entire cascade of dams on the Columbia River System below the sites of the proposed High Mountain Sheep and Nez Perce dams is owned and operated as an integrated power system by the United States for such comprehensive purposes as flood control, navigation, reclamation, fishery management, pollution control, recreation, and power generation. All projects which are under construction on either the Snake River or the Columbia River

below these sites are being constructed by the United States as additions to this multipurpose system. Every undeveloped site on the Lower Snake River up to and including Asotin Dam is presently authorized for federal construction. Each of these downstream federal projects has been planned, engineered and designed for utilizing the upstream storage which will be produced by either the proposed High Mountain Sheep or Nez Perce dam.

The specific projects on this river system and their present status are as follows:

> ASOTON DAM with power plant, situated 42.1 miles below High Mountain Sheep Site, on the Snake River, authorized for federal construction at an estimated cost of $83,300,000 under the Rivers and Harbors Act of 1962;[1]

[1] Act of October 23, 1962, 76 Stat. 1173.

LOWER GRANITE DAM with power plant, situated 39.3 miles below the site of Asotin Dam, on the Snake River, authorized for construction at an estimated cost of $147,000,000 by the Corps of Engineers under the Rivers and Harbors Act of 1945;[2]

LITTLE GOOSE DAM with power plant, situated 37.2 miles below the site of Lower Granite Dam, on the Snake River, authorized for construction under the Rivers and Harbors Act of 1945;[2]

under construction by the Corps of Engineers at an estimated cost of $144,000,000 and scheduled for completion in 1968;

LOWER MONUMENTAL DAM with power plant, situated 28.7 miles below Little Goose Dam, on the Snake River, authorized under the Rivers and Harbors Act of 1945;[1] under construction by the Corps of Engineers at an estimated cost of $158,000,000 and scheduled for completion in 1967;

ICE HARBOR DAM with power plant situated 31.9 miles below Lower Monumental Dam, on the Snake River, authorized under the Rivers and Harbors Act of 1945;[1] an existing project; constructed at a cost of $122,000,000 and operated by the Corps of Engineers;

MCNARY DAM with power plant, situated 42 miles below Ice Harbor Dam, on the Columbia River, authorized by the Rivers and Harbors Act of 1945;[1] an existing project; constructed at a cost of $285,200,000 and operated by the Corps of Engineers;

[2] Act of March 2, 1945, c. 19, sec. 2, 59 Stat. 22.

[1] Act of March 2, 1945, c. 19, sec. 2, 59 Stat. 22.

JOHN DAY DAM with power plant, situated 76.4 miles below McNary Dam, on the Columbia River, authorized under the Flood Control Act of 1950;[2] under

construction by the Corps of Engineers at an estimated cost of $401,700,000 and scheduled for completion in 1968;

THE DALLES DAM with power plant, situated 24.1 miles below John Day Dam, on the Columbia River, authorized under the Flood Control Act of 1950;[1] constructed at a cost of $247,800,000 and operated by the Corps of Engineers; and

BONNEVILLE DAM with power plant, situated 47.0 miles below The Dalles Dam, on the Columbia River, authorized under the Rivers and Harbors Act of 1935[2] and the Bonneville Project Act[3] constructed by the Corps of Engineers at a cost of $84,100,000 and operated by the Corps of Engineers.

This staircase of dams represents a federal investment of $1,673,100,000 for the purpose of establishing a regional multipurpose system designed among other things to obtain the maximum hydroelectric potential of these waterways. These dams in turn form an integral part of the Pacific Northwest Federal Power System which includes an additional fifteen dams, existing or under construction, representing an additional investment of $1,790,300,000 for a total investment of $3,463,400,000, excluding transmission but including the costs of all non-power

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[2] Act of May 17, 1950, c. 188, sec. 201, 64 Stat. 179.

[1] Act of May 17, 1950, c. 188, sec. 201, 64 Stat. 179.

[2] Act of August 30, 1935, c. 831, sec. 1, 49 Stat. 1038.

[3] Act of August 20, 1937, c. 720, sec. 1, 50 Stat. 731.

functions such as flood control, navigation and irrigation, as well as power.

All of these projects downstream of the High Mountain Sheep site are run-of-the-river dams providing no storage and only limited pondage. Full multipurpose utilization of these downstream projects and of the federal dams elsewhere in the Northwest requires the maximum coordination with and control of the storage potential of the Middle Snake River which will be made available by the construction of a major storage project at either the Nez Perce or High Mountain Sheep site. Such coordination can best be accomplished by federal development.

The construction of a storage project at these sites by non-federal agencies will introduce non-federal storage ownership into a controlling position in regard to a complex of federal downstream dams whose power function is primarily generation. The ownership difference will necessarily result in a less complete integration and coordination of the total facilities of the river, with a corresponding loss of benefits. Maximum coordination can be achieved only under single management, i.e. single ownership. When diversity of ownership is introduced, the separate owners inevitably protect individual interests with the result that maximum coordination and flexibility of operation are compromised.

If Federal development is not acomplished, then as a minimum any license issued to a non-federal licensee should require complete coordination with the Pacific Northwest Federal

Power System at no cost to the United States.

One of the reasons which most impels the Secretary to intervene herein, after the Examiner's decision, is that

effective coordination cannot be accomplished under the primitive coordination provisions proposed by the Examiner. It is comparable to that used in the Brownlee license[1] and speaks in terms of coordination with the "Northwest Power Pool." The Examiner disregards completely the evolution,[2] still continuing, of more effective and realistic coordination provisions.

Coordinated operation of two or more projects or two or more systems should mean the operation of these projects or systems, as the case may be, as if they were under a single ownership.[3] A provision for coordination with the Northwest Power Pool is completely ambiguous and unsatisfactory. There are serious doubts as to either its effect or its enforceability. The Northwest Power Pool is a loosely knit association of several generating utilities in the Pacific Northwest. It exists simply by tolerance of its members. It has no authority to require its members to operate their projects on a unified basis or as if the aggregate of such projects were under single ownership. It has no charter or constitution, no bylaws, no obligatory instrument of any sort requiring it to remain in existence from day to day, it cannot sue and be sued, has no responsibility for acts of

negligence due to it, and individual members can terminate their relationship with it at any time that any member decides that it is to its best interest to withdraw.

Coordination should be as nearly complete as possible. It should leave the United States in no worse position than it would be if it were to construct the project, i.e., the coordination should be without cost to the United States.

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[1] Project No. 2133, issued August 4, 1955.

[2] cf. License for Project No. 2149 issued 7/12/62 (Wells Dam).

[3] cf. Federal Power Commission Glossary of Power Terms.

4. Federal development of the High Mountain Sheep site will assure maximum use of the Federal Northwest transmission grid, thereby contributing to maximum repayment of the Federal investment in transmission, which in turn will also inure to the benefit of the power consumers of the area.

All of the federal projects constructed or to be constructed on the Middle Snake, and Lower Columbia Rivers are electrically integrated and coordinated with each other and with the other projects owned and operated by the Federal Government on the Colorado River and its other tributaries in such manner as to achieve maximum production and economy of transmission of the hydroelectric potential of which they are capable, consistent with their proper utilization for other multipurpose objectives. Non-federal generation is also integrated into this same grid. As of June 30, 1962, the Federal investment in transmission facilities in the Middle Snake, Lower Snake and Lower Columbia Rivers and other parts of the Columbia Basin amounted to $512,000,000 in addition to the investment in storage and

generation facilities.

The extraordinary advance in extra high voltage technology is bringing about major changes in the planning of the Federal Northwest transmission grid. The Bonneville Power Adminsiration is now engaged in the process of changing over from 345 KV to 500 KV lines as the basic network in the region. Integration of the Mountain Sheep load through federal development will tend to maximize the advantages possible in extra high voltage transmission, in addition to securing the economies of maximum use of the existing grid.

5. The Secretary of the Interior has responsibility for repayment of the federal investment in the northwest hy-

droelectric system. Such repayment is made difficult by nonfederal construction of generation and storage facilities both because they, being in another ownership or being subject to an unintelligible coordination provision, cannot be completely coordinated and also because they will come on at at time when they are not needed to carry area loads and so will displace already available federal energy and make it surplus. The result inevitably is both to miss the opportunity to maximize firm power and also to make the federal power now available surplus for years until the area's load growth absorbs the ill-timed new generation. The further result financially is that federal revenues diminish and that deficits arise which in turn may force rate increases.

The Secretary of the Interior is vested with the function

of marketing energy available from the federal system. This function of marketing energy includes the responsibility for marketing at rates established with regard to recovery of the cost of producing and transmitting such energy. These functions devolve upon the Secretary by the terms of the Federal Reclamation laws[1] and related statutes,[2] with respect to power plants of that system constructed and operated and maintained by the Bureau of Reclamation; of the Bonneville Project Act[3] with respect to the Bonneville Project, the McNary Project, the projects on the Lower Snake River, and the projects of the Williamette River Basin; of the Rivers and Harbors Act

[1] The Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplemental thereto, including the Reclamation Project Act of August 4, 1939, ch. 418, sec. 2 (53 Stat. 1187), and the Columbia Basin Project Act of March 10, 1943, ch. 14, sec. 1 (57 Stat. 14).

[2] Including the Act of August 30, 1935, ch. 831, sec. 1 (49 Stat. 1028), and the Act of June 5, 1944 (58 Stat. 270).

[3] Act of August 20, 1937, ch. 720, sec. 1 (50 Stat. 731).

of 1945[4] with respect to dams in the Columbia River Basin under the jurisdiction of the Corps of Engineers that were authorized by that act; and of the Flood Control Act of 1944[5] as to other Columbia River Basin units of the federal system under the jurisdiction of the Corps of Engineers. Each of these statutes expresses Congressional policies that requpire the Secretary of the Interior to market hydroelectric

power produced at these projects so as to encourage the most widespread use thereof at the lowest rates possible to consumers consistent with sound business practices, and to return to the Treasury of the United States the reimbursable costs of these projects (including substantial amounts of certain costs of irrigation facilities).

Construction of High Mountain Sheep Dam at the appropriate time, as a federal project, in addition to its at-site production of energy, would make available to the system as a whole substantial amounts of prime power by virtue of generation at other plants from the proper timing of the release of water stored in its reservoir. Failure fully to integrate the hour-to-hour, day-to-day and the year-to-year management of this project with the entire federal system through construction, operation and maintenance by the United States will limit prime power production system-wide and accordingly will decrease materially the value of all units of the system which should directly benefit by the addition of the project.[1]

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[4] Act of March 2, 1945, ch. 19, sec. 2 (59 Stat. 22).

[5] Act of December 22, 1944, ch. 665, sec. 5 (58 Stat. 890).

[1] Due recognition should be taken that the different plans of the nonfederal applicants herein would have a different impact upon the financial returns of the United States. It should be noted that both in respect of coordination of a nonfederal development with the federal system and the transmission of power produced at a nonfederal development, there is a substantial difference between the applicants.

Failure to give proper weight to these factors in the past has adversely affected the repayment by the Bonneville Power Administration of the federal investment. To a great extent such

financial difficulties have been caused by disorderly and unbalanced development of generation in the region. The construction of new resources in disregard of orderly comprehensive development, as proposed by the applicants herin, will cause further difficulties of coordinated operation and further exacerbate the financial problems.

Power needs of the Northwest do not require immediate construction of the High Mountain Sheep Project. One of the reasons which leads the Secretary to intervene now is that the Examiner's decision of October 10, 1962, was handed down just prior to Congressional action which substantially altered the federal power resource program of the Pacific Northwest. This Congressional action requires a complete re-examination and re-appraisement of the conclusions stated as the basis for the Examiner's findings.

The action of Congress in the session just concluded has made provisions for new federal power producing facilities. Brucas Eddy Dam, with a peak capacity of 345,000 KW, was authorized and received an appropriation for the start of construction in Fiscal Year 1963. Asotin Dam, with a peak capacity of 331,000 KW, was also authorized. Little Goose Dam, with a peak capacity of 466,000 KW, which had previously been authorized, received an appropriation for the start of construction in 1963. Most important of all, generation at the Hanford Thermal Project, which would add approximately 905,000 kilowatts to the Northwest's power

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resources was also approved.

There are other possibilities regarding new power sources which have reasonable prospects of realization. They include Canadian storage, realization of which is dependent upon consumation of the Canadian Treaty. Additional firm capacity which would accrue to the United States from such storage would be 1,300,000 kilowatts. In addition, the Treaty would allow the construction of Libby Dam which would initially have a capacity of 397,000 kilowatts. There is also the possibility of the availability in the United States of power from the Canadian entitlement under the Treaty of 1,300,000 kilowatts. Plans are also under way for construction of a 500,000 kilowatt steam plant by Kittitas PUD and Grant County PUD. A number of different agencies have proposed the construction of the Pacific Northwest-Southwest transmission intertie which, by electrical integration, would add an additional 400,000 kilowatts of firm capacity for the Pacific Northwest.

The total power resource of the area is therefore predictably in excess of all foreseeable requirements thereon for the period through 1968-1969 and sufficient to meet all requirements until at least 1972-1973 and potentially for years beyond that date. The addition of High Mountain Sheep Dam will not be needed until at least 1972-1973, and construction should be planned to bring it into production at that time or later as the developing power resource picture indicates.

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New generating facilities, which are not correlated to the power resources and power demands within the area of the marketing responsibility of BPA necessarily result in

surpluses of power on the federal system which is the basic wholesale supplier of power in the area and thereby result in financial deficits on the federal marketing system. In view of the role of the Federal system as the base supplier for the area, this threatens the stability of the area's permanent resources and hence of the area's economy. The High Mountain Sheep project at this time would have such an effect.

The ultimate consequence of the licensing of such new facilities may well in itself have an adverse effect upon BPA net revenues and thereby require an increase in BPA's power rates. The Secretary and this Commission share the duty and responsibility of maintaining these rates at as low a level as is consistent with sound business principles.

6. Federal construction will assure maximum protection of the fish resource.

Under the Fish and Wildlife Act of 1946,[1] the Secretary is directed to develop and recommend measures which will assure protection of fish and to take steps required to develop, manage, conserve and protect fisheries resources.

Under this authority, the Secretary has initiated an immediate study of fish passage problems in the Columbia Basin, and specifically the problems on the Middle Snake River. This study, in 1961, was implemented by an appropriation of $1,100,000

by Congress. Strenuous efforts are being made to develop new facilities and refine known methods for safe passage of the anadromous fish both upstream and downstream.

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[1] Act of August 14, 1946, ch. 965, sc. 1, 60 Stat. 1080, as amended.

The Secretary reiterates the statements made to the Commission by his letter of June 28, 1962, as follows:

"The fishery resources are vitally involved. The Fish and Wildlife Service of this Department is studying intensively the passage of fish, both upstream and downstream, over large structures and through long storage reservoirs. Our studies to date show little promise of a sudden major breakthrough which could produce satisfactory solution to the fish problem at the Nez Perce site by the end of 1964, which was the tentative date for completion of the accelerated research program. A calculated risk that by that time, or within, a few years thereafter, Nez Perce could be accommodated to the anadromous fish runs representing 75 percent of the anadromous fish resources of the Snake River basin would not be warranted on the basis of what these studies are show. The Mountain Sheep project represents less hazard to the fishery resource than the Nez Perce project. We hope the research program will develop effective means for fish passage which can be incorporated into new and existing projects, including the Mountain Sheep project. Additional study and research during the operation of a

Middle Snake River project may disclose improvements which can and should be made to protect still further the fish runs. Construction and operation of the project by the United States will assure that every effort will be made promptly to preserve and improve this important fishery resource in the light of experience and changing technology. The flexibility and relative case with which facilities for effective fish passage could be incorporated in a multipurpose federal proj-

ect should be compared with the difficulties that would be encountered in a project constructed and operated by a non-federal entity. Particularly acute problems involving extensive readjustments for additional costs would be certain to arise."

7. The attainment of the full measure of flood control and navigation benefits is practicable only by federal development of this major storage site, which has an estimated active storage capacity of 2,200,000 acre feet. These matters are of uniquely federal concern. Only a limited number of large reservoir sites remain available. There is an urgent need for full utilization of every opportunity to develop the complete flood control which will protect increasing populations and increasing values of private and public investment downstream. Only by federal development and management of this site will the maximum flood control potential and future flexibility in operation be obtained.

Only federal construction of such a key dam on a river system will allow future generations the opportunity to modify and rephrase multipurpose programs of river management in terms

proportionate to values then existing.

A nonfederal license will freeze, at least for the term of the license and possibly for a much longer time, the purposes for which this dam will be operated. It is now becoming increasingly evident that values now minimized, such as recreation, municipal and industrial water supply, and pollution control, will loom much larger in future years. Federal ownership will introduce flexibility in management that will allow accommodation to changes in values now only dimly realized and possibly wholly unanticipated.

8. Federal construction will result in lower power costs, which in turn will lower rates and so benefit the area and the nation.

9. The various agencies of the Executive Branch of the Federal Government supported by Congressional appropriations have been long engaged in the development of a comprehensive plan for the improvement of the Middle Snake; this effort antedates the interest of the applicants herein and has involved the investment of substantial sums; and it has produced a comprehensive plan which the Commission should find to be the controlling comprehensive plan as prescribed by Section 10 of the Federal Power Act.

As authorized and directed by the federal reclamation laws, the Secretary of the Interior made a study of the Columbia River and its tributaries including the Snake River, and formulated a comprehensive plan for the development of water resources

of the Columbia River Basin, which was transmitted to the President on June 3, 1948. By direction of the President, this comprehensive plan was coordinated with the review report of the Division Engineer of the North Pacific Division, Department of the Army, dated October 1, 1948.

Consistent with its continuing responsibility to carry forward plans for development of the Columbia River and its tributaries beyond the stages where they may exist at any particular time, the Walla Walla District of the Corps of Engineers prepared a report dated December 22, 1953, on the Middle Snake River below the mouth of the Salmon River. The report contained plans for construction of High Pleasant Valley and Low Mountain Sheep dams.

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While these reports were still under review by the Corps of Engineers, Pacific Northwest Power Company was established as a corporate agency owned by only four of the private utilities in the Pacific Northwest and the neighboring state. During this period, this corporate organization prepared application to this Commission for a preliminary permit for construction of Low Mountain Sheep Dam to preempt the site, and preliminary permit was granted by the Commission on April 8, 1955.

Meanwhile on May 21, 1954, the Chief of Engineers of the Department of the Army, and the Commissioner of the Bureau of Reclamation of the Department of the Interior, prepared a joint report[1] on proposed development of the Middle Snake River.

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A further revision was prepared as a joint report of the Corps of Engineers and the Bureau of Reclamation entitled "Middle Snake River, Snake River, and Tributaries; Wyoming, Idaho, Oregon and Washington" as a report of the Chief of Engineers to the Secretary of the Army dated April 25, 1955. This report recommended the construction of a Low Mountain Sheep Dam, but contained alternative plans for construction of High Mountain Sheep Dam.

By resolution adopted July 28, 1955, the Committee on Public Works, U. S. Senate, requested the Chief of Engineers, Department of the Army, to continue his review of reports on the Columbia River and tributaries. A report was submitted in June 1958 by the Division Engineer of the North Pacific Division to the Chief of Engineers of the United States Army, as a review of House Document 531, 81st Congress, 2d Session. It was entitled "Water Resource Development of the Columbia River Basin," and

[1] S. Doc. 51, 84th Cong., 1st Sess. (1955).

purported to define a plan for water resource development in the Columbia River Basin to be designated as the Major Water Plan. It described and recommended projects including alternatives for the Middle Snake Basin which contains both the High Mountain Sheep and Nez Perce sites.

Thereafter, on March 31, 1961, the Chief of Engineers submitted this report to the Secretary of the Army, containing his recommendations on the review of the Columbia River and tributaries. This report of the Chief of Engineers concluded that from

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the viewpoint of flood control and power, the Nez Perce Project would provide the best development of this reach of the Middle Snake River, but recommended the authorization of the High Mountain Sheep project because fewer fish would have to be passed over it. The report further recommended that if the fishery problem were solved by the time the start of the design of either High Mountain Sheep or Nez Perce must commence, the Nez Perce Project should be selected.

The Secretary of the Army, on April 25, 1962, submitted to Congress this report of the Chief of Engineers, dated March 31, 1961. The Secretary of the Army recommended deferring authorization of the proposed High Mountain Sheep Dam pending further fish preservation studies; and that further engineering and economic studies leading to a recommendation for authorization of High Mountain Sheep Dam be undertaken by the Department of the Interior, and that this project be recommended, at an appropriate time, for construction by the Bureau of Reclamation.

Based upon the experience gained from the long and continuing studies of the Department of the Interior, under the direction of Congress, and supported by repeated congres-

sional appropriations of substantial sums, the Secretary of the Interior, on March 14, 1962, had made an identical recommendation to the Secretary of the Army. Likewise, the Bureau of the Budget on April 11, 1962, approved submission of this report to the Congress provided that the Secretary of the Army should propose departures from the recommendations of the Chief of Engineers, such as would,

among other things, lead to construction of the High Mountain Sheep Dam (or any alternative) by the Bureau of Reclamation. Thus for a period of more than 36 years dating from the original 308 Report of 1926, responsible agencies of the United States under directives of Congress, have made exhaustive plans for federal construction of projects at these sites in order to complete the flood control and power system established by Congress.

These very substantial and extensive studies by the United States preceded by many years the advent of the applicants herein.

These plans also constitute a firm and established comprehensive plan having the support of the entire Executive Branch of the Government, and contemplates the construction of a High Mountain Sheep Dam by the Bureau of Reclamation.

It is within the ambit of the Commission's discretion to make a finding that the particular comprehensive plan approved by the President, the Department of the Army, and the Department of the Interior is such "a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial * * * uses," as is required by section 10(a) of the Federal Power Act.

27680

We respectfully urge that in the Commission's determination of the best comprehensive plan, it be given most weighty consideration.

WHEREFORE, the Secretary of the Interior respectfully requests that this Petition for Intervention be granted and that he be made a formal party to this proceeding; and further that this Commission now recommend to Congress that at an appropriate time, the High Mountain Sheep Dam be developed by the United States. In the alternative, if such recommendation is not made, the Secretary of the Interior requests that any license issued to a nonfederal party contain provisions which as a minimum would provide for full multipurpose development and operation including non-power uses present and potential, and for completion of construction not earlier than is necessary to meet the area power shortage now anticipated to develop no earlier than 1972-1973, and which would require complete

27681

coordination of storage and generation and transmission facilities with the Federal Northwest power system without cost to the United States.

Respectfully submitted,

/s/ STEWART L. UDALL
Stewart L. Udall
Secretary of the Interior

/s/ FRANK J. BARRY
Frank J. Barry
Solicitor of the
Department of Interior
Washington 25, D. C.

(27581)

/s/ EDWARD W. FISHER
Edward W. Fisher
Deputy Solicitor of the
Department of the Interior
Washington 25, D. C.

/s/ EDWARD WEINBERG
Edward Weinberg
Room 6413, Interior Building
Washington 25, D. C.

/s/ HARRY J. HOGAN
Harry J. Hogan
P. O. Box 3621
Portland 8, Oregon

/s/ LEON JOUROLMON
Leon Jourolmon
P. O. Box 3621
Portland 8, Oregon

Counsel for the
Secretary of the Interior

27682-27686

CERTIFICATE OF SERVICE

27687

[Docketed Dec. 3, 1962]

BEFORE THE
FEDERAL POWER COMMISSION

Project No. 2243

Project No. 2273

In the Matter of

PACIFIC NORTHWEST POWER COMPANY

WASHINGTON PUBLIC POWER SUPPLY SYSTEM

Motion of Stewart L. Udall, Secretary of the Interior, for Leave to Intervene Out of Time

27688

FRANK J. BARRY
Solicitor of the
Department of Interior

EDWARD W. FISHER

EDWARD WEINBERG

HARRY J. HOGAN

LEON JOUROLMON

Counsel for the
Secretary of the Interior

27689

To the Honorable
The Federal Power Commission:

Comes now Stewart L. Udall, Secretary of the Interior, and submits this Motion for Leave to Intervene Out of

Time in the matter referred to above and, as reasons for his Motion, says:

1. That he is the Secretary of the Interior and head of the Department of the Interior, one of the Executive Department of the United States Government;

2. That in his official capacity he has an interest in this matter, this interest being as more particularly set forth in his Petition for Intervention which is offered for filing at the same time as the filing of this Motion;

3. That for the reasons set forth in his Petition for Intervention his official rights and responsibilities would be substantially and adversely affected by the granting of a license to the Pacific Northwest Power Company to construct a project at Mountain Sheep site on the Snake River, in the States of Idaho and Oregon; and

4. That it now appearing from the Decision of the Presiding

Examiner in this matter issued October 8, 1962, that such license may be issued, the rights and interests of the United States which are represented by him now require protection by his intervention and participation in this proceeding, and such rights and interests cannot be adequately protected by any existing party thereto.

WHEREFORE, the Secretary of the Interior respectfully moves that this Motion for Leave to Intervene out of Time be granted, that his Petition for Intervention be accepted

and filed herein, and that he be made a formal party to this proceeding.

Respectfully submitted,

STEWART L. UDALL
Stewart L. Udall
Secretary of the Interior

FRANK J. BARRY
Frank J. Barry
Solicitor of the
Department of Interior
Washington 25, D. C.

EDWARD W. FISHER
Edward W. Fisher
Deputy Solicitor of the
Department of Interior
Washington 25, D. C.

EDWARD WEINBERG
Edward Weinberg
Room 6413, Interior Building
Washington 25, D. C.

HARRY J. HOGAN
Harry J. Hogan
P. O. Box 3621
Portland 8, Oregon

LEON JOUROLMON
Leon Jourolmon
P. O. Box 3621
Portland 8, Oregon
Counsel for the
Secretary of the Interior

27691-27695

(CERTIFICATE OF SERVICE)

27697

BEFORE THE
FEDERAL POWER COMMISSION

Project No. 2243
Project No. 2273

In the Matter of
PACIFIC NORTHWEST POWER COMPANY
WASHINGTON PUBLIC POWER SUPPLY SYSTEM

Motion of Stewart L. Udall, Secretary of the Interior, Petitioner, for Extension of Time Within Which to File Exceptions to Decision of Presiding Examiner

* * * * * * * * * * *

27698

To the Honorable
The Federal Power Commission:

Comes now Stewart L. Udall, Secretary of the Interior, Petitioner, and submits this motion for a sixty day Extension of Time within which to file Exceptions to the Decision of the Presiding Examiner in the matter referred to above and, as reasons for his Motion, says:

1. That this motion is being made and submitted at the same time as Intervenor's Petition for Intervention and Motion for Leave to Intervene Out of Time are being submitted. If such Petition and Motion are granted, the Petitioner will thereafter have available as time within which to file exceptions only the time remaining before December 10, 1962.

2. Owing to the brief time since the Presiding Examiner issued his Decision on October 8, 1962, it has been impossible to prepare and complete an analysis of the record in this cause sufficiently precise and adequate to enable him fully and properly

to assign the errors of the Presiding Examiner and perfect the exceptions which should be taken thereto. The record is voluminous, being in excess of ninety volumes, excluding exhibits and briefs. The Petitioner respectfully urges that an extension of time of at least sixty days is requisite to enable him to properly and carefully prepare the exceptions and the statements in the nature of a brief which should be made in support thereof.

3. That the issues before the Commission are of such far reaching import to the public and the region served by the Columbia River system that full opportunity should be accorded the Petitioner for preparation and presentation of exceptions to the Presiding Examiner's decision, and to document and support these exceptions by a statement in the nature of a brief which will be consonant with the overriding considerations affecting the public interest in the proper development of the Columbia River system.

4. That the press of other public business for which he has duties and responsibilities has made it impossible for the Petitioner to give this matter the personal direction and supervision which a matter of such importance as the Mountain Sheep project, as it affects the full development of the Columbia River, deserves and requires. In this respect, there are many questions of policy as to the presentation of the Departmental position which require determination and careful presentation in order to fully and properly inform the Commission relative to the development which the Petitioner must urge in his Exceptions. These matters require a

proper measure of deliberation in order that correct decisions be made, and hasty decisions made in order to meet an early deadline would be contrary to the public interest.

WHEREFORE, the Secretary of the Interior respectfully moves that if his Petition for Intervention is granted, this Motion for a sixty day Extension of Time Within Which to File Exceptions to the Decision of the Presiding Examiner also be granted.

Respectfully submitted,

/s/ STEWART L. UDALL
Secretary of the Interior

/s/ FRANK J. BARRY
Solicitor of the
Department of Interior
Washington 25, D. C.

/s/ EDWARD W. FISHER
Deputy Solicitor of the
Department of the Interior
Washington 25, D. C.

/s/ EDWARD WEINBERG
Room 6413, Interior Building
Washington 25, D. C.

/s/ HARRY J. HOGAN
P. O. Box 3621
Portland 8, Oregon

/s/ LEON JOUROLMON
P. O. Box 3621
Portland 8, Oregon

Counsel for the
Secretary of the Interior

27781

[Docketed December 14, 1962]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross and Harold C. Woodward.

PACIFIC NORTHWEST POWER COMPANY
Project No. 2243

WASHINGTON PUBLIC POWER SUPPLY SYSTEM
Project No. 2273

Order Granting Limited Intervention Out of Time

(Issued December 14, 1962)

On December 3, 1962, the Secretary of the Interior submitted a motion and petition to intervene out of time and a motion for extension of time within which to file exceptions to the decision of the Presiding Examiner in the above-entitled proceeding. The two competing Applicants and the staff each filed an answer in opposition to the Secretary's motion for permission to intervene out of time, pointing out that the Secretary has been aware of this proceeding since its inception and has declined to participate in it prior to this time.

As we indicated in our order of November 2, 1962 in *Arizona Power Authority*, Project No. 2248, the proper and expeditious performance of our functions generally requires that intervention by the Secretary, and other officials and agencies of the Federal government in Commission proceedings designated for hearing should be made at the pre-hearing stage specified in our rules. *Turlock Irrigation District and Modesto Irrigation District*, Project

No. 2299, order of October 15, 1962. However, in view of the importance of this case, it would not be inconsistent with the public interest to grant limited intervention to the Secretary and such intervention is granted with corresponding changes in the established procedures of the case, all as hereafter set forth.

The Commission finds:

(1) Although the aforesaid motion for leave to intervene out of time and petition to intervene were not filed within the time required by Section 1.8 of the Commission's Rules of Practice and Procedure (18 CFR § 1.8), good cause exists to permit these late filings, subject to limited participation as hereinafter provided.

(2) The participation of the above-named petitioner in this proceeding as hereinafter provided, may be in the public interest.

The Commission orders:

(A) The Secretary of the Interior is hereby permitted to intervene in the above-entitled proceeding subject to the rules and regulations of the Commission: *Provided*, that the participation of such intervener shall be limited to matters affecting asserted rights and interests as specifically set forth in the petition to intervene; *provided, further*, that the participation of the intervener shall be limited to filing of exceptions to the Presiding Examiner's decision and participation in such oral argument as migh subsequently be ordered; and *Provided, further*, that the admission of the Secretary as an intervener shall not be construed as recognition by the Commission that he might be aggrieved because of any order or orders of the Commission entered in this proceeding.

(B) The time for filing all exceptions to the Presiding Examiner's decision is hereby extended to February 18, 1963.

(C) The parties shall have until March 11, 1963, to file any reply which they consider necessary or appropriate to the exceptions filed by the Secretary.

By the Commission.

/s/ J. H. GUTRIDE
Joseph H. Gutride,
Secretary

SEAL

27791

FEDERAL POWER COMMISSION

In the Matter of

PACIFIC NORTHWEST POWER COMPANY
Project No. 2243

WASHINGTON PUBLIC POWER SUPPLY SYSTEM
Project No. 2273

Exceptions by Stewart L. Udall, Secretary of the Interior, Intervenor, to the Decision of the Presiding Examiner, Issued October 8, 1962

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27792-27795

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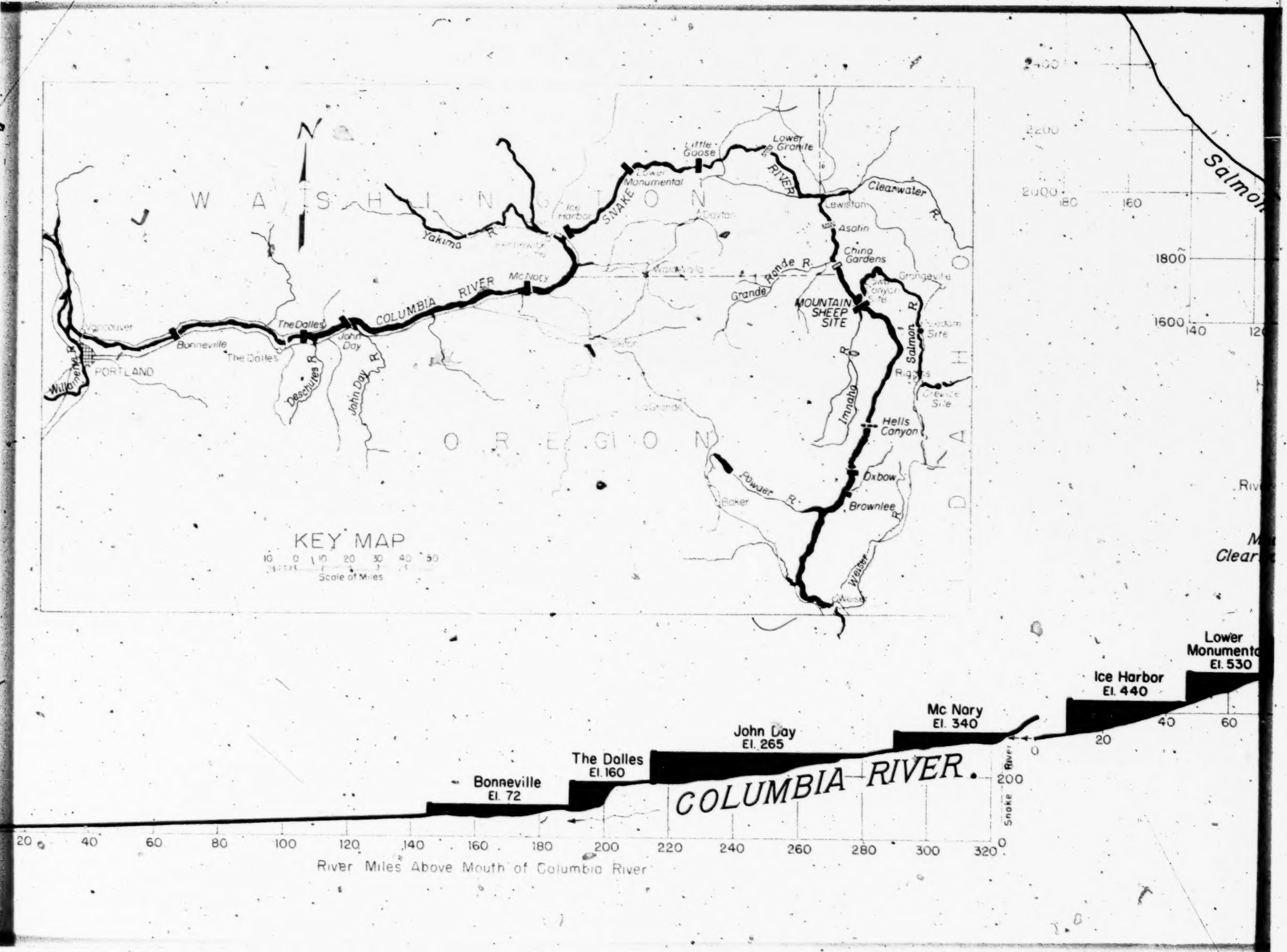
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China Gardens
Grande Ronde R.
Grangeville
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Oxbow
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Powder R.
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COLUMBIA RIVER
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Bonneville
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KEY MAP
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Scale of Miles
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Ice Harbor El. 440
Mc Nary El. 340
John Day El. 265
The Dalles El. 160
Bonneville El. 72
COLUMBIA RIVER
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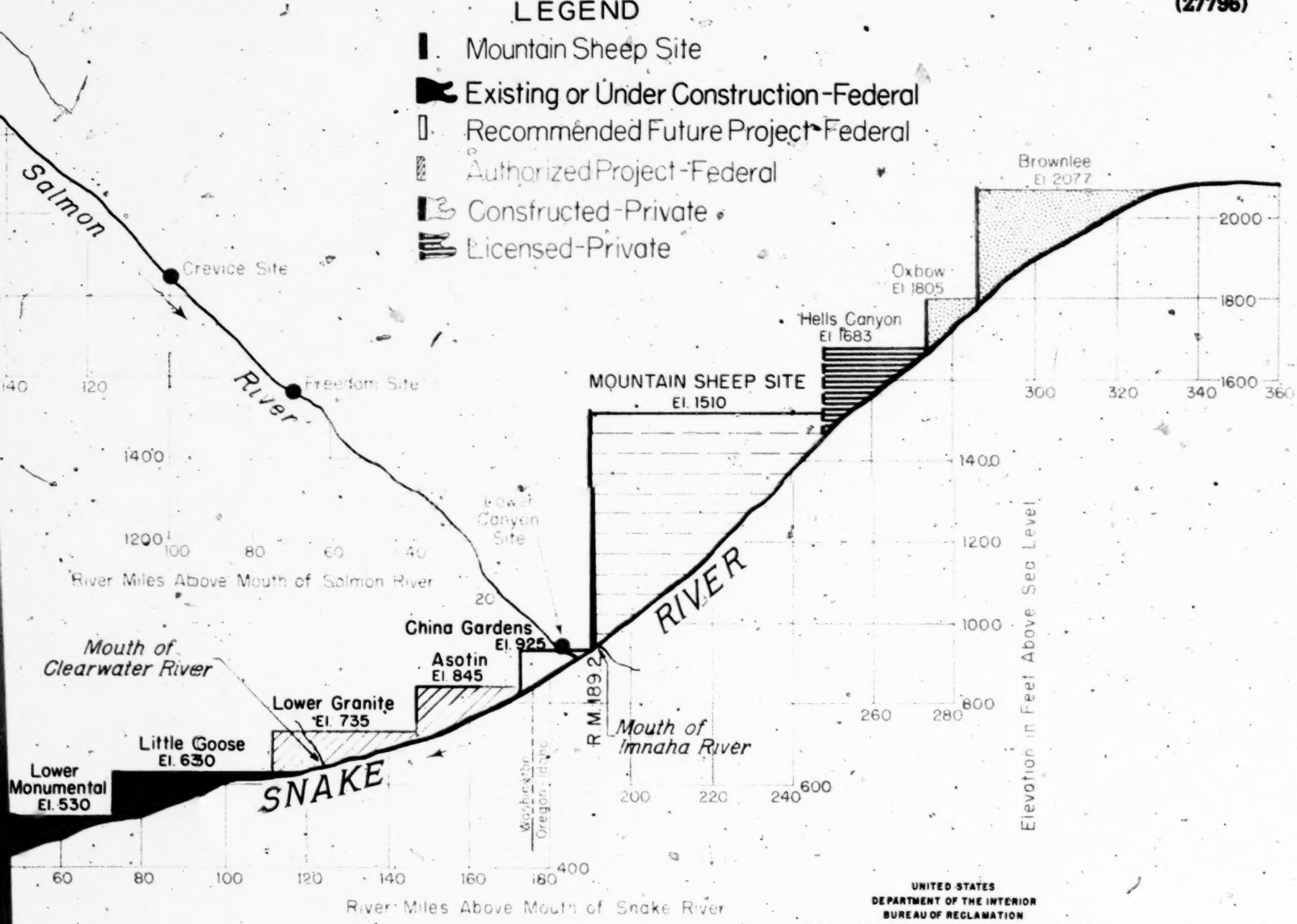

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

SNAKE RIVER PROJECT
Idaho-Oregon
Mountain Sheep Division

RIVER PROFILE
Columbia and Snake Rivers
Portland, Oregon to Weiser, Idaho

775-100-27

27797

In accordance with Section 1.31 of the Commission's Rules of Practice and Procedure, STEWART L. UDALL, Secretary of the Interior, Intervenor in the above-styled proceeding, does hereby except to the Decision of the Presiding Examiner, issued October 8, 1962, which recommends the granting of a license under § 4(e) of the Federal Power Act[1] to the Pacific Northwest Power Company (PNPC).

27798

PRELIMINARY STATEMENT

In 1955 the Federal Power Commission licensed the private development of the upstream end of the Grand Canyon reach of the Snake River, known as Hells Canyon. This episode is proverbial as an example of waste of natural resources. The Hells Canyon decision was characterized as a "blunder" by candidate John F. Kennedy in his address in Billings, Montana, September 22, 1960. The issue before this new Commission is whether what remains of this great public resource, the Grand Canyon of the Snake, shall be reserved for the public—or shall be surrendered to private power interests.[2]

27799

EXCEPTIONS

I

The Secretary excepts to the Examiner's summary conclusion and order that a license for the High Mountain

[1] Act of June 10, 1920, as amended, 41 Stat. 1077, 49 Stat. 839.

[2] Justice Douglas, dissenting in *United States ex rel Chapman* v. *Federal Power Commission*, 345 U.S. 153, 175, (1953) said: "Roanoke Rapids is a power site belonging to the Federal government and now surrendered to private power interests. . . ."

Sheep Project should be issued to the Pacific Northwest Power Company. (Dec. pp. 4, 108).[3]

II

The Secretary excepts to the Examiner's failure to conclude that § 7(b) of the Federal Power Act requires denial of the license applications of PNPC and WPPSS for projects 2243 and 2273 respectively; and his failure to determine that the High Mountain Sheep site should be developed by the United States at an appropriate time. In this regard, exception is taken to the following:

A. The failure to investigate, examine and consider the effects of the proposed project upon existing federal development, for example:

(1) The impact upon repayment of the federal investment in the hydroelectric system in the Pacific Northwest.

(2) The impact upon operation of the downstream federal dams.

(3) The impact upon flood control in the basin.

B. The failure to investigate and study whether federal development would provide greater public benefits than development by license applicants herein. (Dec. p. 93).

C. The conclusion that low cost power is irrelevant in determining whether federal development should be recommended. (Dec. pp. 92-93).

D. The conclusion that delay is necessarily a relevant consideration in determining whether federal or nonfederal construction should be recommended. (Dec. p. 81).

[3] Reference to "Dec." refers to Examiner's Decision, dated October 8, 1962.

E. The conclusion that a recommendation for federal construction would probably result in postponement of development of this site indefinitely. (Dec. pp. 6, 95).

27801

III

The Secretary excepts to the finding that the High Mountain Sheep project, as applied for by PNPC, is best adapted to a comprehensive plan for the development of the Columbia and Snake Rivers for the use and benefit of interstate or foreign commerce; for the improvement and utilization of water power development; and for other beneficial public uses, including recreational purposes. (Dec. p. 4; Finding No. 68, p. 107). In this regard exception is taken to the following:

A. The conclusion that PNPC produced a comprehensive plan in accordance with § 10(a) of the Federal Power Act, and that this plan entitled PNPC to a license. (Dec. p. 6; Finding No. 68; p. 107).

B. The conclusion that timely efforts, expenditures, investigations and reasonable expectations are a basis for granting a license under the Federal Power Act. (Dec. p. 6).

C. The failure to find that federal construction of the High Mountain Sheep project would be best adapted to the comprehensive plan for the waterway.

27802

D. The conclusion that PNPC's High Mountain Sheep project is best adapted to meet flood control requirements. (Dec. p. 29-30; Finding No. 68, p. 107).

E. The finding that the fishery resource will be adequately conserved by the construction and operation of

the High Mountain Sheep project by PNPC; and the implied finding that proposed Articles 44, 45 and 46 will adequately protect the fishery resource. (Dec. pp. 5, 58, 90-91, 112-14; Finding No. 68, p. 107).

F. The conclusion that the fishery intervenors oppose federal development of the High Mountain Sheep site. (Dec. p. 86).

G. The conclusion that the Lower Canyon Dam should be included in plans for the comprehensive development of the Middle Snake River. (Dec. pp. 25, 27; Finding No. 41, p. 102; Finding No. 43, p. 103; Finding No. 67, p. 106; Finding No. 68, p. 107).

H. The finding that staff counsel made a proper appraisal of recreational benefits. (Dec. p. 30).

I. The finding that the companies comprising PNPC will have a power deficiency as of the earliest date the project can be in service which deficiency will equal or exceed the power capabilities of the project. (Dec. p. 35; Finding No. 40, p. 104).

27803

IV

The Secretary excepts to the Examiner's conclusion that the public interest in coordination of the High Mountain Sheep project with other projects in the Columbia River Basin will be as fully promoted and protected by the issuance of a license with appropriate conditions as by federal development. (Dec. p. 89). In this regard exception is taken to the following:

A. The finding that the Northwest Power Pool machinery provides for coordination, hydraulically and electrically, with the storage plants of the federal system so as to pro-

vide for maximum prime energy in the system as a whole under periods of critical water flow. (Dec. pp. 89-90).

B. The failure to require coordination and integration of the project with the existing federal system in the Columbia River Basin so as to provide maximum prime energy in the system as a whole. (Dec. Art. 38, p. 111).

C. The finding that coordination among federal agencies is as difficult as coordination between federal and nonfederal owners and operators. (Dec. p. 89).

27804

I

THE SECRETARY EXCEPTS TO THE EXAMINER'S SUMMARY CONCLUSION AND ORDER THAT A LICENSE FOR THE HIGH MOUNTAIN SHEEP PROJECT SHOULD BE ISSUED TO THE PACIFIC NORTHWEST POWER COMPANY.

27805

I

Commission Should Deny the PNPC and WPPSS Applications For License

Preliminary Summary of Argument on Exceptions

The Secretary respectfully submits to the Commission that the Examiner's Decision errs in three major respects:

1. It fails to consider the effect of the proposed projects upon existing federal downstream development, and to properly judge the merits of federal construction of High Mountain Sheep in accordance with § 7(b) of the Federal Power Act.
2. It fails to judge the applicants' proposed projects against a truly comprehensive plan for the waterway in accordance with § 10(a) of the Federal Power Act.

3. It fails to recognize the importance of full integration of the proposed High Mountain Sheep project into the existing federal system.

Section 7(b) of the Federal Power Act requires the Commission to determine whether federal development of an entire water resource, or any part thereof, is in the public interest and should be recommended

to Congress. If they determined that federal development is warranted, the Commission must deny any pending license applications which would affect this development. Where Congress has already undertaken to develop a portion of a river system, the Commission must determine whether the granting of any pending license application would affect the existing federal development. The application for any project affecting such development must be denied.

In the Columbia River system, Congress has authorized nine federal projects downstream from the High Mountain Sheep and Nez Perce sites. (See frontispiece, River Profile). High Mountain Sheep or Nez Perce Dams, as large storage projects, would have serious effects on the existing run-of-the-river federal dams downstream. Consequently, under § 7(b) of the Act, the licenses should be denied.

Under § 7(b) the Commission must also determine whether the particular High Mountain Sheep reach of the river would be better developed in the public interest by federal project construction and operation. While we do not contend that the Examiner should have recommended immediate federal construction on

the basis of the present record, we submit that his failure to investigate fully the merits of federal construction and

to determine that such construction at an appropriate time should be recommended was error. See Section II hereof.

It was also error for the Examiner to conclude that PNPC's High Mountain Sheep Plan was the comprehensive plan for the waterway under § 10(a) of the Act. Section 10(a) requires that a proposed project be measured against a comprehensive plan for the development of the entire waterway, not merely against the plan for that project. If he had judged the proposed project by the proper standards for optimum waterway development, he would have found that:

a. PNPC or WPPSS construction would not develop the power, flood control, fish and wildlife, and recreation potentials of the waterway as fully as would federal construction, and

b. Immediate construction of either Nez Perce or High Mountain Sheep would create a wasteful power surplus in the Pacific Northwest. See Section III hereof.

27808

It was further error for the Examiner to conclude that the public interest in the coordination of the High Mountain Sheep project with other projects in the Columbia River Basin would be as fully promoted and protected by the imposition of conditions upon the issuance of the license as by federal development. The failure to require coordination and integration of the proposed nonfederal High Mountain Sheep project with the existing federal system in the Columbia River Basin would render it impossible to realize maximum prime energy in the system as a whole. The Northwest Power Pool machinery would not, as found by the Examiner, provide for coordination, hydraulically and electrically, with the storage plants of

the federal system so as to insure maximum efficiency in the operation of the system as a whole during periods of critical water flow. See Section IV hereof.

27809

II

THE SECRETARY EXCEPTS TO THE EXAMINER'S FAILURE TO CONCLUDE THAT § 7(B) OF THE FEDERAL POWER ACT REQUIRES DENIAL OF THE LICENSE APPLICATIONS OF PNPC AND WPPSS FOR PROJECTS 2243 AND 2273 RESPECTIVELY: AND TO HIS FAILURE TO DETERMINE THAT THE HIGH MOUNTAIN SHEEP SITE SHOULD BE DEVELOPED BY THE UNITED STATES AT AN APPROPRIATE TIME. IN THIS REGARD, EXCEPTION IS TAKEN TO THE FOLLOWING:

A. The failure to investigate, examine and consider the effects of the proposed project upon existing Federal development, for example:

1. The impact upon repayment of the Federal investment in the hydroelectric system in the Pacific Northwest.

2. The impact upon operation of the downstream Federal dams.

3. The impact upon flood control in the basin.

B. The failure to investigate and study whether Federal development would provide greater public benefits than development by license applicants herein.

C. The conclusion that low cost power is irrelevant in determining whether Federal development should be recommended.

D. The conclusion that delay is necessarily a relevant consideration in determining whether Federal or nonfederal construction should be recommended.

E. The conclusion that a recommendation for Federal construction would probably result in postponement of development of this site indefinitely.

27810

II

SECTION 7(b) REQUIRES DENIAL OF LICENSES FOR PROJECTS AFFECTING EXISTING FEDERAL WATER RESOURCE DEVELOPMENT

Section 7(b) of the Federal Power Act reads as follows:

> (b) *Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development,* but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development. (Emphasis supplied.)

Under the first clause of § 7(b) the Commission must determine whether "the development of *any water resources* for public purposes should be undertaken by the United States itself." More specifically, the Commission must always determine whether the public needs, such as flood control, power, reclamation, and recreation, require development of a river system, or any portion thereof, by the Federal Government, and whether such federal development would be economically feasible.

(27810)

When a determination has been made under § 7(b) that the development of a particular river system should be undertaken to any extent by the United States, it then becomes incumbent upon the Commission, in passing upon any project license application involving the same water resource, to determine whether the proposed project will affect the federal development of this resource for public purposes.

27811

Only when the Commission has determined that the proposed project will not affect the federal development of the water resource in such a way as to impair its optimum utilization for public purposes can the Commission proceed to approve the project application.

Apparently, the Examiner construed and applied § 7(b) much more narrowly in concluding that this section only requires the Commission to determine whether the particular project applied for should be licensed, or should be recommended for federal development. In support of this construction, the Examiner relied upon quoted from *National Hells Canyon Ass'n.* v. *Federal Power Commission*, 237 F. 2d 777 (D.C. Cir.), *cert. denied* 353 U.S. 924 (1956). But in that case the court did not reach the specific issue raised herein, *i.e.*, whether the Commission must, under § 7(b), make the additional determination that the proposed nonfederal project will not affect the federal development of all or part of the *water resources* involved. The quoted language of the *Hells Canyon* case related only to the determination that the specific project involved, if licensed for nonfederal development, would effectuate or achieve public benefits at least equal to those to be achieved by federal development. But again, § 7(b) requires more. It requires the further determination that approval of the

application will not affect "the development of *any water resources* for public purposes" by the United States.

27812

The Examiner also relies on *United States ex rel. Chapman* v. *Federal Power Commission,* 345 U.S. 153 (1953) (Roanoke Rapids case). There, again, the court did not reach the issue raised here. There the Secretary was contending that Congress had removed the site of Roanoke Rapids, a run-of-the-river power dam, from Commission jurisdiction by approving a comprehensive plan in which it was included. The Court held that the general congressional approval of the plan under the facts of the case did not necessarily earmark that project for federal development. This Court did recognize that if the Roanoke Rapids site had been indispensable to successful execution of the overall plan, congressional approval of federal construction might have been inferred. This recognition is consistent with the Secretary's position in the present matter, involving a major storage site upstream from existing federal development.

The narrow meaning ascribed to § 7(b) by the Examiner might have been correct under the 1920 Federal Water Power Act wherein the pertinent portion of § 7 contained the following language:

> That whenever, in the judgment of the Commission, the development of *any project* should be undertaken by the United States, the Commission shall not approve any application for *such project* by any citizen, association, corporation, State; or municipality . . . . (Emphasis supplied.)

But by the Act of August 26, 1935,[4] this language was amended to include the present language of that section

[4] Ch. 687, Title II, § 205 (49 Stat. 842).

which substitutes the phrase "development of any *water resources* for public purposes," for the more restrictive phrase "development of any *project.*"

It is clear that under this amendment, the Commission must consider the effect of a proposed project on existing or prospective federal development of a particular water resource. The narrow definition of the term "project" set forth in the Act supports this interpretation. Section 3(11) defines "project" as follows:

> "project" means complete *unit of improvement or development,* consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, ... (Emphasis supplied.)

Thus, a "project", under the Act is clearly only a single unit of the overall development or improvement of the particular water resource. In the present case, the water resource we are dealing with is more than the High Mountain Sheep Project site. It includes the entire Columbia, Snake and Salmon River complex, most of which has been developed or is in the process of being developed by the Federal Government for public purposes.

Where, as in the present case, the proposed project is a major multi-purpose facility rather than a mere run-of-the-river dam, it is particularly essential that the Commission carefully consider the effect that such a facility would have upon the development of the water resource—here the Columbia, Snake and Salmon River complex—for public purposes. The Examiner gave no consideration to these factors. Indeed, he refused or failed to recognize that § 7(b) requires such consideration.

27814

If we adopt the Examiner's narrow and obsolete construction and application of § 7(b), it would lead to ridiculous results. Such a construction would lead to the conclusion that a single "project" or unit of development is itself a "water resource", and that any determination regarding the effect of a proposed project must be confined to the site of the project development. This is clearly not what was contemplated by Congress in the 1935 amendment.

Section 7(b) requires that the Commission make two determinations:

1. Whether the water resource, including the site of the proposed project, should be recommended for federal development, and, if so,

2. Whether the licensing of the proposed project will affect the federal development of the resource.

Here Congress has already made a determination that the water resource should be federally developed to the extent of nine run-of-the-river dams downstream from the High Mountain Sheep site.

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The entire cascade of dams on the Columbia and Snake Rivers below the Nez Perce and High Mountain Sheep sites is owned and operated as an integrated power system by the United States for such primary purposes as flood control, navigation, reclamation, fishery management, pollution control, recreational and power generation. All projects under construction on the Snake and Columbia Rivers below these sites are being constructed by the United States as additions to this multi-purpose system. Every undeveloped site on the Lower Snake River up to and including Asotin Dam is presently authorized for federal

construction. Specifically, these projects are Asotin Dam, Lower Granite Dam, Little Goose Dam, Lower Monumental Dam, Ice Harbor Dam, McNary Dam, John Day Dam, The Dalles Dam, and Bonneville Dam. The cost, location and status of said projects are set out on pp. 3-5 of the Secretary's Petition for Intervention. These federal dams occupy all of the length and fall of the Snake and Columbia from Asotin to tidewater.

Clearly in the judgment of Congress, the development of the water resources of the Columbia and the Snake rivers below Nez Perce and High Mountain Sheep "should be undertaken by the United States itself." That this judgment is found in a series of

separate authorizations and comprehensive plans[5] instead of in a single document is irrelevant. The location of these nine projects makes it abundantly clear that Congress ultimately determined that said portions of the Columbia and Snake be developed by the United States itself. Accordingly, said water resources *have in fact been and are being developed by the United States itself* — to the extent of some $1,673,100,000.

The fact that this area has been and is being developed by the United States in the absence of a judgment of the Commission does not, we submit, in any way limit the application of § 7(b). On the contrary, the *actual* development of the area pursuant to authorization by Congress *compels* the Commission to make the second determination under § 7(b)—whether the licensing of the High Mountain Sheep project would in fact affect the existing federal development. The purpose of § 7(b) being to protect

[5] See pp. 57-58, *infra*, and see Secretary's Petition for Intervention, pp. 2-5, 17-22.

necessary federal development of all or any part of a given water resource from the adverse effects of any nonfederal project, it cannot be seriously contended that § 7(b) protects only those areas proposed by the Commission for federal development and not those areas already developed by the

United States. If the Commission is forbidden from approving an application for a project affecting a development which "should be undertaken by the United States," then *a fortiori*, it is precluded from approving an application for a project affecting an *existing* development by the United States.

Nor is it necessary that the Nez Perce or High Mountain Sheep site be originally within a particular plan of federal development, although we submit that they are. The second clause of § 7(b) precludes the Commission from approving "any application for *any* project *affecting* such development." Again, if the purpose of § 7(b) is to be effectuated the test must be whether any project *affects* such development so as to impair the optimum utilization of this resource or any part thereof.

In summary, Congress has already determined that the water resource here involved should be federally developed to the extent of nine downstream dams. No license should be issued for any project affecting this development.

A. *Examiner Was Required to Investigate the Effect of the Project Upon Existing Federal Development*

Since § 7(b) prohibits the licensing of any project which would affect existing federal development, the Commission is obligated to take the necessary steps to determine whether any proposed project

would affect such development. In addition, the provisions of § 4(c) of the Federal Power Act under which Congress required the Commission "to cooperate with the executive departments" of the Government, even though in limited fashion, should have a persuasive influence on the Commission when dealing with matters in which another branch of the Government has vital interests.

Of primary importance are the substantial physical effects which nonfederal development would have upon existing federal projects. These effects are developed and discussed more fully in Section IV hereof. For present purposes, it is sufficient to point out that all the federally owned and operated downstream projects below the proposed site would be materially affected if a license is issued. Proper integration of the High Mountain Sheep storage project could add materially to the firm power which may be produced by each downstream facility. Each of these federal developments has been engineered to take advantage of the regulated flow which fully integrated storage facilities could maintain. It is also pertinent to point out that there is an inherent conflict between the private goal of maximum power production at the project site and the federal goal of a unified system power production both at the site and downstream. We refer the Commission to the full development of this aspect of the case appearing in Section IV, *infra*.

The Commission's staff was or should have been aware of the fact that the United States has expended more than three billion dollars in federal funds to construct a power system in the Columbia River Basin. Yet nowhere in the 99 volumes of testimony introduced in this case in three years of hearings, in the 674 exhibits filed before the

Examiner can we detect any reference by the Commission's staff to the effect which nonfederal construction of the High Mountain Sheep project would have upon the federal investment in the region.

The Examiner made no reference whatever in his 72 additional findings and conclusions to the effects which the construction of the project by PNPC might have upon the economics and operation of the federal water and power system in the Columbia River Basin. Yet the Commission had been advised through the statutory letters of the Department of the Interior: (1) that the potential alternative sources of new power made prudent a delay in further consideration

of projects for the Middle Snake; and (2) that the varied and predominantly federal interests involved in the development of this area made it essential that the High Mountain Sheep Dam be built by the United States at the appropriate time. With this advice and the Examiner's knowledge of existing federal downstream developments, a heavy burden fell upon the staff to determine in what manner these developments would be affected by the proposed nonfederal projects.

In this section we seek to bring to the Commission's attention in specific terms the effects which nonfederal construction has had in the past and the effects which should be expected from the proposed project. All of the facts which are recited herein are based upon official records of the Commission and other matters of which the Commisison may take official notice under § 1.26(d) of the Commission's Rules of Practice and Procedure, to-wit: official government reports, censuses of the United States,

Federal Power Commission reports,[6] Department of the Interior reports, and geographical facts.

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The Petition for Intervention filed by the Secretary of the Interior stated that the failure to consider the proper timing and orderly construction of projects has in the past adversely affected the repayment by the Bonneville Power Administration of the federal investment. It was therein stated that to a great extent such financial difficulties have been caused by disorderly and unbalanced development of generation in the region. The Petition also pointed out that the construction of new resources in disregard of orderly comprehensive development, as proposed by the applicants herein, will cause further difficulties of coordinated operation and further aggravate the financial problems.[7]

BPA sells its power on a "requirements" basis—agreeing to meet the power requirements of its customers. In the past, large portions of BPA's revenues have been derived from power sales to private utilities. BPA has, in effect, been the power bank for the Pacific Northwest. Nonfederal power agencies are able to come to BPA for power when they need it and to cut off their purchases from BPA as they increase production of their own power, leaving BPA with unsold power surpluses.

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From 1950 to 1957 there was a continuous growth in the revenues of BPA. The most significant growth occurred between 1954 and 1957, when revenues increased from

[6] Section 311 of the Federal Power Act (16 U.S.C. 825j) authorizes the Commission to secure the information contained in these reports. See also § 6 of the Bonneville Project Act (16 U.S.C. 832e) and § 5 of the Flood Control Act of 1944 (16 U.S.C. 825s) which relate to the establishment of rates in the Pacific Northwest federal power marketing program.

[7] Petition for Intervention, pp. 9, 11-12.

$46,485,000 to $67,663,000—a net increase of over $21,000,000. Beginning in 1958 and continuing through the present there has been a sharp change. Annual revenues have leveled off and the growth has been gravely retarded. By 1961 revenues had slackened to $66,897,000. During the eight years from 1950 through 1957 there was a continual but wholesome increase in nonfederal generation. The average annual increase in nonfederal resources was 165,000 kilowatts. Then in the four years from 1958 through 1961 the full effect of the prior administration's "partnership" policy began to be felt. In 1958 began a 4-year surge in nonfederal projects; 799,000 kilowatts went on the line, the largest unit being Brownlee Dam. In 1959, 633,000 kilowatts were constructed, the largest units being Priest Rapids and Noxon Rapids. In 1960, the increase was 371,000 kilowatts and in 1961, 1,341,000 kilowatts were placed in service at Rocky Reach and Oxbow. The average increase in nonfederal capacity from 1958 to 1961 was 786,000 kilowatts per year as compared with 165,000 kilowatts per year from 1950 to 1957.

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It is not mere coincidence that the year in which Brownlee came on the line was also the year in which Bonneville operations first suffered a deficit. There was a definite causal relationship between these two events. BPA's deficit was the inevitable result of the increase in nonfederal development and the denial of orderly federal development of the same resource.

We can discern the cause of the reduction in Bonneville revenues by separating these revenues into two sources: (1) the utilities both public and private which own their own generating plants, and industries, and (2) the nonindustrial customers which operate utilities without generating plants. These revenues show that the customers which did not put in generating plants have had a

consistent growth and the revenues they supply to the Government have grown steadily from 1950 to 1962 on a fairly continuous ascending scale.

On the other hand purchases of BPA power by industries and generating utilities have in the aggregate declined from 1955 to 1961, thus counteracting all of the growth which the non-generating utilities achieved. Industrial revenues leveled off in the decade from 1952 to 1962 and a sharp industrial recession brought further revenue reductions in 1956 and 1957.

The generating utilities continued to increase their purchases of power from BPA until 1956. At that time the purchases virtually leveled off until 1959, reflecting the growth in nonfederal generation, and especially the plants constructed by Idaho Power Company. The normal markets of Idaho Power Company were insufficient to absorb all the plant capacity of Brownlee, the largest single project which came on the line toward the end of this period.

In the proceedings before the Idaho Public Service Commission during 1962 relative to the $14,000,000 rate increase case of Idaho Power Company, the companion matters, it was shown that subsequent to the building of Brownlee Dam the Idaho Power Company sold large blocks of power to Pacific Power and Light Company and the Washington Water Power Company, two of the parents of PNPC. These blocks amounted to 75,000 kilowatts firm peak capability and 50,000 average kilowatts for the seven month period, September 15 through April 15. Additional amounts of energy and peaking could be purchased from Idaho Power Company on a firm basis each year in advance to the extent available. The two purchasing companies could have bought energy from BPA for 2 to 2½ mills per kilowatt hour (kwh) but instead made contracts to purchase

power from Idaho Power Company at 4.75 mills per kwh,[8] leaving BPA with unsold power surpluses.

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These contracts reduced the purchases of these companies from BPA by amounts ranging upward from 75,000 kilowatts. They reduced Bonneville's annual sales by $1,312,500 or more. The revenue losses drastically reduced BPA's net income. A 9 million dollar revenue drop in 1958 resulted in its first deficit of $3,000,000. In each succeeding year this deficit has become larger, reaching $14,000,000 in 1961. This is the period during which the generating utilities were increasing their generating capacity at the rate of nearly 800 megawatts per year.

Section 311 of the Federal Power Act requires the Commisison to secure and keep current information concerning the capacity and output of the Nation's facilities for generation of electricity. It also is required to keep itself currently informed regarding the ratio between these two. The annual federal plant factors in the Pacific Northwest may be obtained from FPC form 12 reports. Through 1957 the annual federal plant factor was approximately 73 to 75 percent. In 1958 it began to fall, dropping from 75.5 percent in 1957 to 59.5 percent in 1962.

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Among the most significant facts before the Commission in this case are those relating to the economics of wholesaling power. In the past the federal Columbia River power system has been the basic wholesaler of power in the region. When Grant County PUD constructed Priest Rapids Dam, it became a power wholesaler, selling its entire output to various utilities throughout the region,

[8] *In re Idaho Power Co.*, order No. 6647, dated Dec. 11, 1962, and *In re Food Mach. and Chem. Co.*, relative to electric rates and service of Idaho Power Co., order No. 6636, dated Nov. 28, 1962, pp. 15-16.

reducing BPA's market, and contributing substantially to the deficit described above.

Now in the presnt case it is proposed that additional wholesalers be brought into the region. The privately-owned utilities involved in this proceeding propose the creation of a wholesaling generating utility which would sell large blocks of power to the distributing companies which own it. It is estimated that in three years BPA revenues would suffer an aggregate reduction of more than $10,000,000 if a license is issued herein. These wholesalers propose to sell to customers presently buying federal power. It is inconceivable that either one of the new wholesale power agencies could be licensed without further reduring the gross and net revenues of BPA.

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If BPA deficits continue, the federal system will find it increasingly difficult to fulfill its distinctive role of providing an ample power supply at lowest cost and with widespread availability. The adverse effect of the continuing deficit would be felt in the rise of wholesale power rates which have remained stable over the past quarter of a century. These rates have contributed materially to regional development and to the national strength and defense in World War II, the Korean conflict, and the Cold War. Impaired service and higher rates on the federal system would be a bar to effective advance planning on the part of communities, industries and even to the utilities which are here seeking licenses. The overall effect of further deterioration of the position of the federal power system would ultimately be reflected in the productivity and general economy of the Pacific Northwest.

The facts we have been stating are readily available to the Commission. Records maintained by the Commission clarify these points in far greater detail than we have

stated here. The secondary effects of BPA revenue losses upon the economy of the Pacific Northwest can likewise be shown from the Commisison's reports and basic data in the Commisison's files. The matters discussed in this chapter are of such gravity that if the Commission has any doubt of

its right to take official notice of the facts recited, it would be warranted in reopening the record in the case *sua sponte*.

B. *Examiner Should Have Investigated the Benefits of Federal Development.*

As we have pointed out, under § 7(b) the Examiner should have recommended denial of the license applications because of their effect on existing federal downstream development. In addition, the Examiner had an obligation under the first clause of § 7(b) to independently determine whether the High Mountain Sheep site, as a part of the overall water resource under consideration, should have been recommended for future federal development.

The Examiner failed to recognize the obligation of the Commisison itself to conduct a full and complete examination of the advisability and feasibility of federal development and operation. He made it clear in his decision that he did not regard federal development as an issue.[9]

[9] In this regard the Examiner made the following relevant statement:

> The basic issues in this proceeding are which of the *proposed projects* is best adapted to a comprehensive plan of development for all public purposes as required by Section 10(a) of the Act; which, if any, should be licensed, and to whom should the license be issued. This in turn depends upon a wide range of . . . considerations . . . including the safety and stability of the *proposed dam sites and project structures*, the impact of the *proposed project* on the fishery resource, comparative economic and financial feasibility, the needs and market for the power output of the *proposed projects*, the relative qualifications and legal status of the competing applicants, and an overall comparison of the *proposed plans and projects* in terms of design, costs, benefits, and other relevant factors. (Dec., p. 11). (Emphasis supplied.)

Rather, he regarded it as "an additional issue raised by the Secretary of the Interior's letter . . ."[10] However, § 7(b) requires the Commission to exercise its own judgment in determining whether federal development should be recommended. To exercise this judgment properly it must have competent evidence before it. The duty to gather evidence is imposed by the Federal Power Act, not by the Secretary's letter.

The purpose and function of the Federal Power Commission are dual in nature. It, like other regulatory agencies, is charged by statute with simultaneously exercising the functions of judge and guardian of the public interest. Under the Federal Power Act the Commission is expressly charged with the duty to make its examinations and to present its own findings regarding federal development and to either grant or withhold approval of nonfederal applications on the basis of its own quasi-judicial evaluation thereof. Although the Commission need only advocate federal development when in its judgment the public interest so requires, it is charged with the duty in every license application to consider the merits of federal development on behalf of the general public of the United States. The

Commission is not intended to be merely a judge of competing applications; it must also be an active guardian of the public interest.

The Commission in 1920 became the trustee of the people's interest in the water power to be derived from their navigable rivers. "The grant of a license under the act is a gratuity, a privilege from the sovereign, and can

[10] Dec. p. 11. Reference to letter of June 28, 1962.

only be justified on the theory of the benefit to inure to the public." *Clarion River Power Co.* v. *Smith*, 59 F. 2d 861, 863 (D.C. Cir. 1932).

When the original Federal Water Power Act of 1920 was pending in the House, Congressman Sims, Chairman of the Special Committee on Water Power Legislation, declared that it provided for "unlimited, unrestricted development and operation of water power projects by the United States Government" under § 7.[11] He also stated:

> . . . when the Commission deems it in the public interest that the United States should develop, own and operate a project it will make a report to Congress, giving its reason for coming to that conclusion, with its recommendations, so that Congress may provide the means with which to do it, because the Commission has no power to make an appropriation or to make a charge upon the Treasury.

Chairman Sims did not state that the bill would limit the power of the Commisison to an investigation and a recommendation to Congress. But, he indicated that "when the issue arises between the Nation

and private capital" the bill ". . . provides that the Commisison shall withhold any permit applied for by a state, municipal corporation or private interests on any particular project and make report with recommendation."[12]

When the bill was before the Senate, Chairman Wesley L. Jones of the Committee on Commerce, although recognizing that private capital would be attracted to engage in water power development, declared with equal emphasis

[11] 56 Cong. Rec. 9037 (1918).

[12] 56 Cong. Rec. 9041 (1918).

that "the Federal Government, has through its Commission, the *first right* to develop any of the water powers under its jurisdiction."[13] (Emphasis supplied.)

The "first right" of the "Federal Government" to develop any of the water powers under its jurisdiction is the keystone of the Commission's powers. A thorough investigation was made of the PNPC proposal. WPPSS was prohibited from presenting its complete proposal, and no investigation was made of federal development beyond a cursory glance. Our concern is with the disregard of federal development.

Although the staff presented comparisons of the first and second alternatives at some length and in some variety, it presented no data or analysis of the benefits and costs of federal development.

Accordingly, there is no proper evidentiary basis for the Examiner's finding. Surely he has not accepted the statements of the competing applicants as to what federal development would provide and in what way and manner their proposed project would be superior. Such statements are at best self-serving and cannot possibly be considered sound or unbiased testimony upon which a finding, which would comply with the requirements of § 7(b), can be founded. As the Examiner notes (Dec. p. 86), the Federal Power Act and cases decided thereunder require the Commission to deny the application when a nonfederal plan will not "effectuate or achieve" the public benefits possible by federal development. A finding so material can only be made on competent evidence.

This legislative history demonstrates that § 7(b) establishes priorities in treatment by the Commission. Until

[13] 59 Cong. Rec. 244, 246.

the Commisison disposes of the issue of federal development, it should not consider nonfederal development.

The Federal Power Act is consistent with sound conservation in that it ranks public benefits above private interests throughout the statute. As to the licensing of water power projects, it sets an order of priority as follows:

1. Federal development under § 7(b).
2. Development by public nonfederal agencies under § 7(a).
3. Development by private nonfederal agencies.

The error of the Examiner is that he reverses these priorities.

The finding of the Examiner that there is no evidence in the record that federal development will provide greater benefits than the development proposed by the applicants implies an actual comparison of federal with nonfederal development. The Examnier's statement on this subject completely obscures the fact that at no point in this proceeding was there a presentation of the case for federal development. The clear implication of this finding is that federal development was thoroughly examined, fully considered and found wanting. This is not so.

The duty of the Commisison to compile evidence exists independent of the presentation of such evidence by any other agency of the United States. In the past, evidence relating to federal development has often been prepared for the Commission by others.

In *Roanoke Rapids* the case for federal development was presented during the hearings by the Secretary of the Interior. In *Hells Canyon* it was presented during the

hearings by the National Hells Canyon Association. Consequently, when these cases were

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review, the courts were able to determine from the record whether the Commisison applied proper legal principles and whether it acted within proper discretionary limits. The courts will have no such opportunity in the present case. The record is barren of the evidence necessary for a proper evaluation and determination under the Act.

We respectfully submit that if the Federal Power Commission is to fulfill the purposes for which it was created, a proper reorientation of its functions is necessary. "The original conception of the Commission as an administrative agency representing the public must be reborn; it must permeate commission practice and procedure in all of its ramifications."[14] The specific factors favoring federal development are discussed in detail later.

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C. *Low Cost Power is a Relevant Factor in Determining Whether Federal Development Should be Recommended*

The Examiner discussed the matter of lower rates for power and discarded this subject in his Decison at pages 92-93. He concluded that the Commission in considering whether a project should be referred to Congress for construction by the United States must give no consideration to the economic benefits from low power rates which would be made available to the people of a region by such construction.

This principle does violence to a primary congressional policy underlying the establishment of federal projects.

[14] Mosher and Crawford, Public Utility Regulations, 40 (1st ed. 1933).

Congress has adopted a federal power policy that electric power service be rendered at the lowest possible rates compatible with sound business principles. The preference in the sale of federal power to states, municipalities, and cooperatives in the reclamation laws means that the consumers are to receive such power at a cost consistent with the payout responsibilities assigned to power.

Beginning with the Bonneville Project Act of 1937,[15] Congress provided that the rate schedules applicable to power from Government projects

should be drawn with regard to recovery of the cost of producing and transmitting energy, including amortization of the capital investment over a reasonable number of years. The same provision was placed in the Fort Peck Act of 1938.[16] The Reclamation Project Act of 1939[17] prescribed that the rates charged for power should produce revenues sufficient to cover the portion of operation and maintenance costs allocable to power and interest at 3 percent on the investment allocated.

In the Tennessee Valley Authority Act,[18] Congress expressly provided that the TVA, in selling power to or for the use of industry, should secure a sufficiently high load factor and revenue return to "permit domestic and rural use at the lowest possible rates."

There is thus a consistent and continual purpose in Congressional legislation that the power benefits of the projects be distributed to the consumers at cost.

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[15] Act of August 20, 1937, 50 Stat. 731, as amended March 6, 1940, 54 Stat. 47; October 23, 1945, 59 Stat. 546; July 26, 1946, 60 Stat. 701, 16 U.S.C. § 862 (1960).

[16] Act of May 18, 1938, 52 Stat. 403, 16 U.S.C. § 833 (1960).

[17] Act of August 4, 1939, 53 Stat. 1187, 43 U.S.C. § 485 (1962).

[18] Act of May 18, 1933, 48 Stat. 58, 16 U.S.C. § 831 (h).

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Similarly, the economic benefits of low cost power are a primary purpose of the Federal Power Act.[19] It cannot be seriously contended that lower power rates to millions of consumers are not related to the public interest. The resulting economic benefits which flow to an entire region cannot be disputed. Nor can it be argued that these economic benefits to an area such as the Pacific Northwest are somehow unrelated to the public interest. Yet this appears to be the Examiner's holding.

The Examiner, citing as authority the Commission's decision and the Circuit Court's affirmation thereof in the *Hells Canyon* case, concludes with the startling generalization that "the Commission and the courts have specifically rejected this [the low cost of power] argument."[20] It is unfortunate that the Examiner should regard the

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Hells Canyon decision as precedent for anything but another blunder.

Moreover, in holding that the cost of power is wholly irrelevant the Examiner has misinterpreted both *Hells Canyon* opinions. Bad as they were, they were not that bad. A basis for the Examiner's sweeping conclusion cannot be found in either the Commission's or the court's decision. The clear implication of the Commission's state-

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[19] See, e.g., §§ 10(h), 19, 20, 205, 206. See also § 5 of the Flood Control Act of 1944, codified with the Federal Power Act, 16 U.S.C. § 825(s). And see *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *Safe Harbor Water Power Co.* v. *Federal Power Commission*, 179 F. 2d 179 (3d Cir.), *cert. denied* 339 U.S. 957 (1950); *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787 (2d Cir.), *cert. denied* 320 U.S. 815 (1943); *Metropolitan Edison Co.* v. *Federal Power Commission*, 169 F. 2d 719 (3d Cir. 1948).

[20] Dec. pp. 92-93.

ment is that low cost power is not the *sole* or *decisive* consideration in evaluating federal development:

> There is no provision in . . . the Act which leads us to believe that Congress intended that we recommend Federal development for the *sole purpose* of making power available at (lower) costs . . . (Emphasis supplied) (Dec. p. 92; *Idaho Power Co.*, 14 F.P.C. 59-60)

Similarly, the Circuit Court held that the lower cost of federally developed power was not *the* criterion under § 7(b):

> If this were *the* criterion under Section 7(b), federal development would invariably be preferable . . . (Emphasis supplied.) (Dec. p. 92; *National Hells Canyon Ass'n.* v. *F.P.C.*, 237 F. 2d 777, 781 (D.C. Cir. (1956)).

Neither decision holds that lower cost as a result of federal development is not *a* factor, *a* consideration, or *a* criterion. A holding that it is irrelevant is especially unwarranted when we consider the court's express approval and adoption of the Examiner's

reasoning in regard to the effect of delay in developing Hells Canyon:

> Keeping the consumer in mind—if the denial of all of the applications herein would have only the practical result of driving the Idaho Power Company to a steam-electric program at a much higher cost and with resultant increases in rates for power—I am doubtful that such action would be in the public interest. *Only if such denial were to pave the way for lower cost*

power for those consumers would I believe such a denial would be in the public interest. (Emphasis supplied.) (*National Hells Canyon Ass'n* v. *F.P.C.*, 237 F. 2d at 782.)

National Hells Canyon Association does not require the Commission to adopt a double standard. We cannot conceive that the Commission and the court would employ low cost power to the consumer as a principal reason for awarding a license to a privately owned applicant, and in their next breath completely reject low cost power to the consumer as a consideration in evaluating federal development. Such a conclusion ignores legislative purpose, defies common sense and offends justice. Yet, this is precisely how the Examiner construes the holdings.

Although we readily concede that lower cost power to the consumer is not the sole or the decisive criterion in evaluating federal development, it is nevertheless, an exceedingly important consideration in weighing the relative advantages of private as against public development. A decision which does not take it into consideration, which

completely ignores it as a standard against which private development is weighed, constitutes, we submit, error in law and in fact.

The Examiner relies upon language in *National Hells Canyon Association* to the effect that if lower rates were the criterion under § 7(b), federal development would invariably be preferable and the Commission's authority to issue licenses to private applicants could never be exercised without first recommending the proposals for federal construction.

This argument is untenable. In the history of the Federal Power Commission, there have been hundreds of

applications for licenses. Among these numerous applications for licenses there have been less than a dozen in which the Department of the Interior or any other federal agency has urged that the Commission make a referral to Congress under § 7(b). In the Pacific Northwest the Department of the Interior made no opposition to, and in some cases supported the development of sites by non-federal utilities for Cabinet Gorge, Noxon Rapids, Pelton, Round Butte, Swift, Merwin, Priest Rapids, Rocky Reach, Wells, Mayfield, Mossy Rock, Packwood, Box Canyon, Bliss and many others. The proposals by the Department of the Interior that projects under license application be federally constructed have generally been limited to those relatively few important projects where the Federal Government has first proposed federal construction as part of its comprehensive development.

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D. *Delay Is Not a Relevant Factor in Determining Whether to Recommend Federal Development*

In concluding that delay is a relevant factor in determining whether to recommend federal development, the Examiner apparently relied upon the following statement in *United States ex rel. Chapman* v. *Federal Power Commission,* 345 U.S. 153 (1953):

> We are simply asked to decide whether Congress has withdrawn the power to decide this question from the Commission. To conclude that Congress has done so by approving a general plan for development that may be, and in this case was, a plan for long-term development, would be to contract, by a tenuous chain of inferences, the broad standing powers of the Commission. *Particularly relevant in this regard is the estimate that public development at this site would not*

> *in the normal course be undertaken for many years.* 345 U.S. at 169. (Emphasis supplied.)

The real basis for the Court's conclusion is apparent from the following statement:

> Our conclusion is in accord with the implications of the manifest reluctance of Congress to enter upon power *projects having no flood-control* or navigational benefits. 345 U.S. at 170. (Emphasis supplied.)

The latter statement shows clearly that the *Roanoke Rapids* case is not authority for the application of the delay principle in the present case. Unlike the Roanoke Rapids project, High Mountain Sheep will provide substantial flood control benefits.

Also dissimilar to the facts in *Roanoke Rapids,* Congress has shown little reluctance in authorizing the orderly, step-by-step development of the Columbia and Snake main stems. Functionally, geographically and economically, development of High Mountain Sheep and China Gardens is an eventual step in that orderly development. Aside from the substantial flood control benefits mentioned above, the physical and economic effects of High Mountain Sheep on the immense Congressional investment ($1,673,100,000) in federal facilities directly downstream strongly support the expectation that Congressional authorization will be made at the appropriate time.

Moreover, the statement of the Examiner that there is less likelihood of federal development in this case than in the *Roanoke Rapids* and *Hells Canyon*[21] cases (Dec. p. 95) is without foundation.

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[21] *National Hells Canyon Ass'n.* v. *Federal Power Commission,* 237 F. 2d 777 (D.C. Cir.), *cert. denied* 353 U.S. 924 (1956).

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in light of the policies of the present administration and recent congressional authorizations for additional projects in the Columbia River Basin.[22] The new starts which were authorized in the last congressional session conclusively indicate that federal development of this site in the foreseeable future is more propable than in the cases noted and relied upon by the Examiner. It should be noted again that in *Hells Canyon* specific legislative authorization for that project had been sought and had been rejected over a period of approximately six years.

The Examiner's reliance on the *Hells Canyon* case is also unwarranted in light of the fact that there, the Secretary of the Interior had withdrawn the intervention of the Department and the proposal for federal construction of Hells Canyon Dam. The Secretary had also withdrawn the Hells Canyon project from the legislative program of the Department. By way of contrast, there is, at the present time, vigorous support for the federal construction of the High Mountain Sheep Dam. The Corps of Engineers as well as the Department of the Interior have

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recommended federal construction of this facility and the Bureau of the Budget has concurred in these recommendations for federal construction at the appropriate time. The goal of a federally constructed multipurpose project above the confluence of the Snake and Salmon Rivers has been and will remain an integral part of the legislative program of the Department of the Interior which embraces also, protective measures for the preservation of the fishery resources of the Salmon River and a National recreation area on the reservoir above the dam-site.

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[22] Bruces Eddy, (authorization), Asotin, (authorization), Little Goose (funds appropriated in 1962).

Delay is inevitable if the Commission fully performs its statutory functions under the Act. The framers of the Federal Power Act recognized that delay could be an important element in the proper development of our water resources. The recognition of this fact is apparent from the inherent delays under § 7(b).

After a determination under § 7(b) that the United States should develop an area or project, it is not contemplated that the Commission report or make any recommendation to Congress

immediately, or within any express period of time. The recommendation may be made only after the Commission staff has conducted surveys, prepared the reports and plans stipulated in the statute. If a recommendation is made, it must then be presented to Congress, where it will be reexamined, studied, possibly amended and reamended before it is finally accepted or rejected. Haste was not contemplated by Congress when it passed the Federal Power Act.

Consideration of delay as a relevant factor would depart from the precedent of long standing under which the Commission in its early days refused to act upon license applications which would interfere with major federal plans.

In the case of Grand Coulee Dam, a proposal was made for a private development called Kettle Falls, for which the Commission received applications early in the 1920's. The Commission was responsive to the need for a major federal program to construct Grand Coulee and held the Kettle Falls application on the shelf for many years.

Bills were first introduced for federal construction and operation of Hoover Dam on April 25, 1922. One week earlier the Federal

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Power Commission had by resolution suspended its licensing authority for all projects on the Colorado River until the matter of federal construction at the Boulder Canyon site was disposed of. When, in 1925, the Commission considered revoking this suspension, legislation was passed by Congress to suspend the licensing authority of the Commission on the Colorado River until February 1929. The Boulder Canyon Project Act was finally passed, six sessions of Congress after its original introduction, on December 21, 1928. During this entire period the Commission either on its own motion or under direction of Congress had held its licensing authority in suspension, although forty-five license applications were pending in the Colorado River Basin.

The public development of the Tennessee River and the Muscle Shoals area thereof were before Congress for a period of 35 years. In 1897 the Muscle Shoals Power Company unsuccessfully sought authority to construct a power plant at Muscle Shoals. Wilson Dam was ultimately constructed at Muscle Shoals pursuant to § 124 of the Federal Defense Act of 1916 (39 Stat. 166, 215), just before the First World War, and was dedicated to full service of the public in 1933, when the Tennessee Valley Authority was created. During

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this time, some twelve congressional proposals were made and defeated in Congress before a program of federal development was finally adopted. These examples indicate that the more important a federal development is, the more likely that there will be efforts to pre-empt the site for private development under Commission licenses.

Numerous other examples could be used to demonstrate that any important federal project needed by the people

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can be defeated by a determined private power group through using the processes of the Commission. To defeat Hells Canyon they proposed Oxbow, to which they later, pushed into a corner by the Department of the Interior and the Hells Canyon Association, ultimately added Hells Canyon and Brownlee.

As a rival to the high dam development of the Tennessee River by the Tennessee Valley Authority, they proposed the construction of eleven low dams between Wilson Dam and Knoxville. (H. Doc. 328, 71st Cong. 2d sess. 1930). Instead of Knowles Dam, they are proposing rival Buffalo Rapids. Instead of Boulder Canyon they proposed a rival dam at Boulder Canyon and forty-four other projects on the Colorado and its tributaries.

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If previous Commissions had considered delay to be a relevant factor to the same extent as the Examiner here, there would have been no Hoover Dam, no Grand Coulee, and no TVA. All would have been pre-empted by licensed private projects inadequately developing the resource.

Surely the Commission, in evaluating the Examiner's concern with haste, will not overlook the fact that it was not until twelve years after President Theodore Roosevelt called for legislation in the Rainy River veto, that Congress finally enacted the Federal Water Power Act itself.

III

THE SECRETARY EXCEPTS TO THE FINDING THAT THE HIGH MOUNTAIN SHEEP PROJECT, AS APPLIED FOR BY PNPC, IS BEST ADAPTED TO A COMPREHENSIVE PLAN FOR THE DEVELOPMENT OF THE COLUMBIA AND SNAKE RIVERS FOR THE USE AND BENEFIT OF INTERSTATE OR FOREIGN COMMERCE; FOR THE IMPROVEMENT AND UTILIZATION OF WATER POWER DEVELOPMENT; AND FOR OTHER BENEFICIAL PUBLIC USES, INCLUDING RECREATIONAL PURPOSES. IN THIS REGARD, EXCEPTION IS TAKEN TO THE FOLLOWING:

A. The conclusion that PNPC produced a comprehensive plan in accordance with § 10(a) of the Federal Power Act, and that this plan entitled PNPC to a license.

B. The conclusion that timely efforts, expenditures, investigations and reasonable expectations are a basis for granting a license under the Federal Power Act.

C. The failure to find that Federal construction of the High Mountain Sheep project would best adapt to the comprehensive plan for the waterway.

D. The conclusion that PNPC's High Mountain Sheep project is best adapted to meet flood control requirements.

E. The finding that the fishery resource will be adequately conserved by the construction and operation of the High Mountain Sheep project by PNPC; and the implied finding that proposed Articles 44, 45 and 46 will adequately protect the fishery resource.

F. The conclusion that the fishery intervenors oppose Federal development of the High Mountain Sheep site.

G. The conclusion that the Lower Canyon Dam should be included in plans for the comprehensive development of the Middle Snake River.

H. The finding that staff counsel made a proper appraisal of recreational benefits.

I. The finding that the companies comprising PNPC will have a power deficiency as of the earliest date the project can be in service which deficiency will equal or exceed the power capabilities of the project.

III

PNPC Construction of the High Mountain Sheep Project Is Not Best Adapted to Comprehensive Development

The Examiner's Decision fails to meet the requirements of § 10(a) in a number of respects. It measures the PNPC application against the Company's own plan for development of a limited stretch of the waterway. It fails to give full consideration to the conservation of the fishery resources of the river system. It affords only the most cursory consideration to the recreation potential of the area. And, finally, it misjudges the electric power needs of the region. If these errors are perpetuated by the granting of a license to PNCP, the result will be damage to a major fishery resource, unfulfilled recreation potentials, and a wasteful power surplus in the Northwest—a major squandering of natural resources which comprehensive planning and federal licensing requirements were designed to avoid.

A. *The High Mountain Sheep Plan is not the Comprehensive Plan Under Section 10(a)*

In concluding that the "High Mountain Sheep Plan of development is the comprehensive plan of development for this reach of the river under the standards established by Section 10(a) of the Act," the Examiner evidenced a fundamental misconception of the requirements of § 10(a). The section states that:

> . . . the project adopted . . . shall be such as in the judgment of the Commission will be *best adapted to a comprehensive plan* for improving or developing a *waterway* or *waterways* for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development and for other beneficial public uses, including recreational purposes . . . . (Emphasis supplied)

The Examiner treated the High Mountain Sheep Plan consisting of four dams in a limited stretch of the river system, as *the* comprehensive plan under § 10(a). He then went on to find that the High Mountain Sheep project is the project best adapted to this plan. This is not the type of finding contemplated by that section.

Section 10(a) requires that the Commission judge each proposed project against an objective comprehensive plan for the optimum coordinated development of the entire waterway. The term "comprehensive plan" embraces two concepts: geographic comprehensiveness and functional comprehensiveness. Both concepts are encompassed by the term as it is used in § 10(a). The plan must consider the entire water resource (the river system), and all the functions to be served by development (flood control, power, navigation, fisheries, etc.). Since a dam in one stretch of a river inevitably affects the other reaches of

the river, geographic comprehensiveness is indispensable to functional comprehensiveness. The Examiner was concerned only with functional comprehensiveness in a limited reach of the river.

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Section 10(a) had its genesis in the general dam act of 1910.[23] That act empowered the Chief of Engineers and Secretary of War to approve plans and specifications for private water power dams authorized by congressional acts. Section 1 of the act provided, in pertinent part, that:

> . . . in acting upon said plans as aforesaid the Chief of Engineers and the Secretary of War shall consider the bearing of said structure upon *a comprehensive plan* for the improvement of the *waterway* over which it is to be constructed with a view to the promotion of its navigable quality and for the full development of water power . . . . (Emphasis supplied.)

This language obviously contemplated that proposed projects would be measoured against a comprehensive plan for full development of the entire waterway. This was clearly borne out in the legislative history of the Federal Water Power Act of 1920.[24]

The House and Senate reports[25] on H. R. 3184, which became the Federal Water Power Act, described the "comprehensive plan" reference in the 1019 act as follows:

> The new act provided that there should be a comprehensive plan for the development of a river and

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[23] 36 Stat. 593.

[24] 41 Stat. 1063.

[25] H.R. Rep. No. 61, 66th Cong., 1st Sess. (1919); S. Rep. No. 180, 66th Cong., 1st Sess. (1919).

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waterway system; that each particular dam project should be given consideration *not only with a view to* the locality where constructed but with reference to the entire water system of which it constituted a part and that the plan should be so framed as to bring about the greatest possible development of navigation and also of water power. (Emphasis supplied.)

There is no indication that the 1920 Act was intended to change this concept. There, however, the language on comprehensive planning omitted the reference to "waterway" and read as follows:

> Sec. 10 . . . (a) That the project adopted shall be such as in judgment of the commission will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of waterpower development, and of other beneficial uses . . . .[26]

In 1935, the language was amended to its present form, restoring the reference to waterways and broadening the functional purposes of the plan to include recreation.[27] It is apparent that the "comprehensive plan" to which the Commission must now find the proposed project best adapted, is the same type of geographically comprehensive plan which the House and Senate reports described when they said that each project should be considered with reference to the entire water system.

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Consideration of the Federal Power Act as a whole only buttresses this conclusion. Sections 4(a), 4(c), 7(a), 7(b),

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[26] 41 Stat. 1068.

[27] 49 Stat. 842.

and 202(a) all relate to comprehensive planning. Sections 4(a) and 4(c) authorize the Commission to investigate the utilization of "*the water resources of any region*" and to cooperate in this with other federal agencies. Section 7(a) gives a preference to States and municipalities for projects well adapted to conserve and utilize the "*water resources of the region.*" Section 7(b) refers to "*any water resources.*" Section 202(a) authorizes the Commission to encourage interconnection of facilities to assure an abundant supply of electric energy throughout the United States. When all of these sections are read in connection with § 10(a) under the *in pari materia* principle, there can be little doubt that the term "comprehensive plan" has a much broader meaning than is ascribed to it by the Examiner.

The concept of geographic comprehensiveness was recognized by the Supreme Court in *United States ex rel Chapman* v. *Federal Power Commission, supra,* (Roanoke Rapids case). There the Corps of Engineers and recommended a Congress a comprehensive plan for the development of the Roanoke River Basin, proposing a basin system of eleven dams and reservoirs. Congress had approved

the plan and authorized two of the projects. A private applicant sought a license from the Commission to construct one of the other nine dams. Justice Frankfurter indicated that approval of the plan by Congress did not necessarily deprive the Commission of jurisdiction to grant licenses for dams approved in the plan but not authorized for federal construction. However, he recognized that:

> . . . even if private construction is to be allowed, approval of private applications requires a determination that the proposed project is "best adapted to a

> comprehensive plan'' for water resources development. 41 Stat. 1068 as amended, 49 Stat. 842, 16 U.S.C. 803(a). . . . Congressional approval of a comprehensive plan can be read, as we think it should be in this case, as saying that a plan such as that here, recommended by the Corps of Engineers for the fullest realization of the potential benefits *in the river basin,* should be accepted by the Commission as the comprehensive plan to be used in the application of these statutory provisions. (Emphasis supplied.) 345 U.S. at 168.

In the Roanoke Basin, the Commission had a duty to determine whether the project sought was best adapted, not to the development of a limited reach of the river, but to the development of the water resources of the entire river basin. In the Columbia River Basin their duty is the same.

Just as in *Roanoke Rapids,* where Congress had approved a comprehensive plan for Roanoke Basin development, here Congress

has approved a comprehensive plan for Columbia-Snake River system development. A total of nine dams and reservoirs has been authorized for federal construction in the system. Four are in operation and three are under construction. This nine dam complex constitutes the portion of the comprehensive plan approved by Congress to date. As indicated by Justice Frankfurter in *Roanoke Rapids,* the Commission should accept this plan and measure the project proposed here against it.

For a period of more than thirty-six years, dating from the original H. R. Doc. 308 Report of 1926, responsible agencies of the United States, under directives of Congress,

have made exhaustive studies and plans for federal construction of projects involving the Columbia and Snake Rivers in the interests of navigation, flood control, irrigation, and hydroelectric power. As early as 1948, the Corps of Engineers issued a comprehensive plan for Columbia River Basin development which recommended construction at either the Nez Perce or the Mountain Sheep site. Most recently the Corps transmitted to Congress on April 25, 1962, its review report of March 31, 1961, which continued its comprehensive planning of the Columbia River Basin. It would be appropriate in light of *Roanoke Rapids*, and of

§4(c) of the Act, for the Commission to accept the full Corps plan as the comprehensive plan for the basis, especially in the absence of a separate comprehensive study of the basis by the Commission itself.

In transmitting the March 31, 1961, review report to Congress, the Secretary of the Army in his letter of April 25, 1962, recommended that authorization of High Mountain Sheep be deferred, that further studies be made by the Department of the Interior, and that the project be authorized, at an appropriate time, for construction by the Bureau of Reclamation. In letters to the Commissioner of Reclamation and the Chief of Engineers dated June 21, 1949, a previous Commission concluded "that the plan presented by two agencies represents a desirable and coordinated basic framework for the comprehensive development and utilization of the water resources of the Columbia River Basin." We urge the Commission to take the same position here, and to judge the proposed project against the plan most recently developed and recommended to Congress by the Corps of Engineers.

B. *Timely Efforts, Expenditures, and Investigations are not the Proper Criteria for the Issuance of a License*

The Examiner also erred in giving major weight to the "timely efforts, expenditures, and investigations" made by PNPC. He stated.

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in the Decision that:

> Pacific Northwest Power Company, rather than WPPSS, is entitled to a license to build Mountain Sheep because its timely efforts, expenditures, and investigations have produced the comprehensive plan and the project best adapted to that plan. These expenditures were made pursuant to a preliminary permit issued by the Commission . . . and its reasonable expectations should not be thwarted absent strong public policy considerations not present in this record. (Dec. p. 6)

That statement is erroneous both as to the plan and as to the rights of PNPC. It displays an inordinate concern with the position of PNPC. The PNPC effort and its timeliness relate to its own plans and not to the comprehensive plan of development. Acceptance of the Examiner's concept here would render difficult, if not impossible, meaningful and equitable decisions on future applications. Comparison of two at-site plans does not provide the required basis under Federal Power Commission regulations for a finding that a project meets the requirements of § 10 (a). If this consideration were relevant, the far greater and more timely efforts, expenditures, and investigations of the Federal Government that have produced the only comprehensive plan for the basin would themselves compel a recommendation for federal construction.

Not anly is the Examiner's findings erroneous for the reasons stated, it is deficient in that it violates the very basis on which the

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Commission acts on hydroelectric license applications, which the Chairman of the Federal Power Commission stated on May 15, 1962, namely:

The fundamental standard is "the public interest."(Dec-p. 50).

C. *Federal Construction of Multi-Purpose Projects is Intrinsically Better Adapted to Comprehensive Development than Private Construction*

Even if the Examiner had used the proper standards in making his § 10(a) determination, he would still be in error in deciding that the PNPC project was "best adapted to a comprehensive plan for improving or developing" the waterway. A project of the size and scope of High Mountain Sheep Dam cannot fully realize its multi-purpose potential when it is operated for the primary purpose of power production.

The primary purpose of PNPC and WPPSS is to develop the hydroelectric power of the Snake and Salmon Rivers. To accomplish this primary purpose, they propose the construction of several projects. The High Mountain Sheep Plan of PNPC provides for the development of the Snake River by a storage project at the High Mountain Sheep site and a run-of-river dam at China Gardens. It includes the eventual, although not immediate, development of the Salmon River by the

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construction of Lower Canyon Dam at elevation 1595, approximately four miles above the confluence of the Snake

and Salmon Rivers. The plan would also include, eventually, a storage dam at the Crevice site on the middle Salmon and a smaller dam at the Whitebird site.

As secondary objectives, PNPC would use these projects for flood control, for fish passage facilities, for low water regulation, and for recreation. We refer to these as secondary inasmuch as they are burdens upon the primary purpose for which PNCP would operate the project—the production of power.

The plan of WPPSS is stated in alternative forms. The first is the Nez Perce Plan, and the second alternative is the WPPSS High Mountain Sheep Plan. The Nez Perce project would be for the primary purpose of developing the hydroelectric potentials of both the Snake and Salmon Rivers with the reservoir flooding both rivers. It would flood both the reservoir site of High Mountain Sheep and and the reservoir site of Lower Canyon on the Salmon. To keep the hydroelectric development on a comprehensive power basis there would be future dams at Whitebird, Freedom and Crevice, the last being a major storage project.

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Here, also, WPPSS would expect to meet the non-power potentials to which the public is entitled—flood control, preservation and protection of fish resources, recreation and low water regulation as secondary objectives.

The Department of the Interior also proposes a specific comprehensive plan. Its plan is a long-range plan for the development of the Columbia River below its confluence with the Snake River, for the Snake River as a tributary of the Columbia, and for the Salmon River as a tributary of the Snake. It includes in the region where the Snake and Salmon follow parallel courses to the south, the moun-

tain areas consisting of public lands which lie between the canyons in which the rivers flow, thus embracing the Seven Devils mountain range.

The primary objective of the federal development include a program of slack water navigation facilities and locks with a navigation channel from the mouth of the Columbia up to and including Lewiston, Idaho. Flood control of the Snake River below the High Mountain Sheep site and of the Columbia River below its confluence with the Snake is also a primary objective. Other primary objectives include the use of the dam at the High Mountain Sheep site for the production of hydroelectric power and as a river control structure to regulate the flow of

the Snake and Columbia below that site to increase the power production at the federal power plants at Asotin, Lower Granite, Little Goose, Lower Monumental, Ice Harbor, McNary, John Day, The Dalles, and Bonneville. These primary objectives also include the conservation of anadromous fishery resources by a system of fish ladders and other protective devices and by establishment of a fish and wildlife sanctuary upon the Salmon River. They further include the establishment of a recreation area embracing and perpetrating as a resource of national significance the canyons of the Salmon and Snake Rivers, the High Mountain Sheep reservoir, and the surrounding mountain ranges and wilderness areas.

In addition to these primary objectives, it will increasingly be a primary objective of the United States to preserve the waters of the Snake and Columbia from pollution and industrial wastes, and otherwise to effectuate programs which will increase the benefits which the public will receive from all other possible public uses of this entire waterway.

We have made these points to clarify the great difference between comprehensive development by private agencies and comprehensive

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development by the Federal Government, as it applies to the entire region surrounding a great storage site such as that in controversy in this case. The same term is used in both cases, but the term has a decidedly different meaning—as pronounced as the difference between Tom Thumb and Paul Bunyan.

The waterway may be developed comprehensively for the single primary purpose of hydroelectric power, as the applicants herein propose, with the inclusion of a number of secondary benefits; but this is much inferior to developing the same waterway for all of the purposes which yield public benefits as primary objectives. The standards of functional comprehensiveness under private development can hardly be considered equivalent to those which the Federal Government is equipped to develop.

All of the separate functions from which public benefits may flow in the development of a water course are matters of primary concern to the United States Government. The Corps of Engineers has primary responsibility for flood control and navigation. The Bureau of Reclamation has primary responsibility for irrigation and reclamation of land, and for utilizing power projects as a means of accomplishing this.

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Fishery agencies of the Department of the Interior, together with the coordinate agencies of the states, have primary responsibility for preserving the Fish resource. The National Park Service and the Bureau of Outdoor Recreation are primarily responsible for preserving the outdoor

areas and wilderness for public recreation. The Department of Agriculture through its Forest Service has similar duties. The Department of Health, Education and Welfare has primary responsibility for preserving the waterways from pollution.

In seeking the project best adapted to the comprehensive development of the full water resources of the basin, the Commission must recognize that a nonfederal entity which seeks to improve a river primarily for power furnishes non-power benefits to the public on a limited basis, whereas the United States continually seeks to obtain the maximum development physically possible. This difference is relatively unimportant when small run-of-the-river dams are under consideration. But it is crucial when an application for a major storage project is involved.

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D. *PNPC Construction of High Mountain Sheep Would Not Provide Optimum Flood Control Benefits*

The High Mountain Sheep project is a flood control facility and as such it should unquestionably be built by the United States which has primary responsibility for flood control.[28] It is not possible for nonfederal facilities to provide as complete flexibility of flood control operation as federal facilities.

This fact can be demonstrated clearly by an explanation of the flood control system constructed and planned for the Columbia River Basin. The major flood control facilities for the basin should be operated as a unified system as if they were under single ownership and control. When completed, the system will include projects in the Canadian reaches of the Columbia River system at Mica Creek and

[28] See *United States ex rel. Chapman* v. *Federal Power Commission*, 345 U.S. 153 (1953).

Arrow Lakes on the Columbia, and Duncan Lake on the Kootenai. On the Clark Fork there is Hungry Horse and on the Pend Oreille there is Albeni Falls; and below all of these dams on the main Columbia is Grand Coulee. On the Snake there is Brownlee and a proposal for High Mountain Sheep.

Thus, each separate watershed which contributes flood waters to

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the flood plain of the Columbia River system is presently or eventually will be under control.

The development of flood control parameters for the operation of a regional system of flood control reservoirs is a highly complicated process. Parameters are necessary to provide flexibility of operation in controlling various degrees of flood control runoff. Parameters for operation to control floods have long been developed and are in use to control flood releases and storage at the federal reservoirs. But because of their complexities and variations it has never been practical to establish such parameters for the control of nonfederal storage reservoirs. As a result, instead of flexible parameters, fixed limitations are included in Federal Power Commission licenses for non-federal developments. While these fixed limitations provide some flood control, they do not permit the flexibility required for optimum flood control operation.

On the other hand, if High Mountain Sheep reservoir were under full federal ownership and control, complete flexibility of operations would be achieved within the flood control parameters thus satisfying

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differing requirements in accordance with the variations in the volume of flood discharges over the Columbia River Basin.

The United States has established a series of meteorological reporting and recording stations throughout the area, and from the data recorded by this system short-term forecasts can be made as to the most probable areas of flood hazard. The first snow surveys become available annually in January and are succeeded by additional survey data throughout February and March. If the probability of flood danger is greatest in the Clark Fork subbasin, for example, the reservoirs there which control floods are operated beyond fixed limitations in order to meet the immediate dangers. Under this system, power losses due to flood control become inconsequential. This is what a unified flood control system regularly accomplishes.

If flood dangers were to result from excessive snow conditions in the Snake River sub-basin, the operation of the High Mountain Sheep project for flood control would result in loss of power to the project. This might be a significant consideration to a nonfederal owner, who would be naturally hesitant to operate the project beyond the fixed limitations provided under his license conditions. In contrast,

if the High Mountain Sheep project were operated by the Federal Government in the same situation, power losses at the individual project could readily be offset by adjusting storage among other facilities of the system.

E. *PNPC Construction of High Mountain Sheep would not Adequately Conserve the Fishery Resource*

The Examiner's decision is gravely against the public interest in that its implementation would seriously endanger the perpetuation of a living and valuable natural resource for which the Federal Government, and particu-

larly the Department of the Interior, has an explicit and primary responsibility.

If a license were granted to PNPC under the terms specified in the Decision, contrary to the thrust of all of the Secretary's exceptions, inadequate protection would be provided for the fishery resources of the river. Such a license would place crucial facilities and operations under an entity primarily concerned with an inconsistent purpose—the production and sale of electric power. Experience has shown that such an arrangement is not dependable: all of the needs and contingencies that may arise cannot be anticipated and specified in a license, enforcement is difficult, responsibility is diffused, and decisions in the interest

of effective resource management cannot be made and carried out to meet pressing needs.

The major error of the Examiner in this connection is his disregard of the alternative of federal development of the project. Federal construction and operation would better assure the responsible, flexible and effective management of the project in the interest of fishery conservation in conjunction with the other multiple purposes and uses of the project in a unified main control plan. The Examiner's view (Dec. pp. 89-91) that the public interest will be as fully protected under a license as by federal development is unrealistic and out of line with general experience in the regulation of private dams. A prominent example is the Idaho Power Company's Project No. 1971.

Early in the study of fish problems at the dams included in Project No. 1971, Brownlee, Oxbow, and Low Hell's Canyon, there was considerable difference of opinion about the types of facilities required. Inasmuch as analysis of

the problem and solution involved negotiations with a company which was not favorable to the protection of the fishery resource, the construction of the dam proceeded without adequate provision for fish and substitute facilities became necessary at a later date. As a result, unsatisfactory devices contributed to

heavy losses of fish at these projects. (Tr. 1403-18, 8227, 9003-294). Federal ownership of the facilities would have simplified or eliminated these problems.

It is not in the public interest to discount the value of the fishery resource affected by the proposed High Mountain Sheep Project, on the basis of harm done to this resource by IPC operations at Brownlee and Oxbow. The Snake River runs thus damaged may be rehabilitated. This river's potential may be increased by the conservation and development programs of the future. Such a resource should not be casually written off in a power-license decision. The matter is one for conservation planning and policy formation on a more prudent and comprehensive basis and at a higher and more responsible administrative and legislative level. This point argues further for control of multiple uses by the Federal Government, as responsible for national resources across the board.

The proposed Article 46 is inadequate to protect the fishery resource.

In the proposed Article 46, the Examiner seeks to maintain jurisdiction over fish and wildlife resources by requiring that protective devices requested by the fishery agencies, including the Department of the Interior, must be analyzed by the Commission. This would not

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be consistent with the authority and responsibility of the Secretary of the Interior to protect the fish and wildlife resources of the Nation. Further, it would constitute a usurpation of the powers granted to the Secretary of the Interior by the following language of § 18 of the Federal Power Act:

> . . . The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of Commerce.[29]

The assumption of this prerogative by the Federal Power Commission in previous cases (over the protests of this Department) has created innumerable problems in resolving facility requirements at licensed projects. The Commission is not a resource management agency, and is not qualified to pass upon such matters properly and promptly. Even though the Secretary of the Interior may propose the necessary fish facilities, the Commission, in attempting to resolve any differences of opinion with the licensee, creates

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unnecessary delay, confusion, and division of authority, to the prejudice of the public interest in fish and wildlife resources.

The experience with the Idaho Power Company on Project No. 1971, described above, illustrates the gross inadequacy of any condition, such as the proposed Article

[29] Fishery responsibilities have been transferred from the Secretary of Commerce to the Secretary of the Interior.

46, which does not require the licensee to construct, maintain and operate such fishways as the Secretary prescribes. Recommendations of the Secretary of the Interior for fish passage facilities at the Oxbow powerhouse were challenged by the Idaho Power Company. The Company proposed abandoning natural propagation at Pine Creek and disregarded the need for a fishway at Oxbow powerhouse. With the delay that ensued a substitute plan including experimental means of handling artificial propagation at Oxbow was necessitated and is presently in force.

Extreme mortality during the construction period at Oxbow Dam resulted from the lack of direct control by the Secretary of the Interior and the fishery agencies and the failure of the Federal Power Commission to properly supervise the construction of facilities for the protection of the fishery resource during the construction period.

There is no provision under present operational procedures for

the Secretary of the Interior or his representatives to inspect with authority the construction of fishery facilities at projects licensed by the Commission. The Commission does not adequately inspect the construction of these facilities with full regard for the requirements of fish. At Oxbow a structural failure of fish facilities at the diversion tunnel caused the mortality of several thousand adult salmon. Such problems would be avoided or eliminated if the construction of High Mountain Sheep Dam were entirely under the supervision of the Secretary of the Interior.

The illustrations selected show clearly the difficulty of handling fishery conservation matters under a license condition drawn in advance. All contingencies cannot be fore-

seen. Provisions cannot be drawn specifically enough to meet the variety of conditions which may arise. Decisions cannot be made promptly and competently enough to meet conditions. They may have to go through lengthy review procedures, perhaps to the courts. In the meantime, irreplaceable natural resources may be damaged or lost.

In addition, Article 46 is deficient in not requiring the licensee to take measures to mitigate the damage to the fishery. Mitigative measures would be a necessity at High Mountain Sheep Dam, and are

included in the proposal for federal construction in the form of spawning channels, rearing ponds, and other aids in the Middle Snake area.

Stream flow requirements in Articles 44 and 45 should provide fishery protection

Under proposed Article 44 there is a provision that the daily stream flow may be reduced to as low as 4,000 acre-feet when the discharge of the Columbia River at the Dalles is 600,000 cfs or higher. There is no provision for the release of 4,000 acre-feet throughout the day to assure adequate flow for the protection of fish. Presumably this could be released during part of the day, leaving the balance with no flow. Such drastic change in flow is not consistent with the needs of the salmon resource.

In proposed Article 45 a minimum flow of 13,000 cfs is required at Lime Point, Idaho, in the interests of navigation. This flow could be provided by discharge from the Salmon River or other tributaries below High Mountain Sheep Dam permitting a complete shutdown at the dam with no apparent consideration for the protection of the salmon. These conditions indicate the difficulty in drawing a license provision

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in sufficiently specific terms to meet requirements, and the kind of problems that may arise under any license. The operating requirements undoubtedly would be met, including full consideration of the salmon problem, if the dam were operated by the Department of the Interior.

F. *Fishery Intervenors Do Not Oppose Federal Development*

The Department of the Interior cannot concur in the Examiner's conclusion that the fishery Intervenors oppose federal development of the High Mountain Sheep site. Fishery Intervenors' testimony indicated a general desire for unobstructed waterways and more specifically an opposition to dams at Nez Perce and Lower Canyon as they would obstruct fish passage on the Salmon River. (Tr. pp. 1175-481). Support was indciated for legislation that would prevent construction of dams in that river. The Mountain Sheep development was favored as a choice between alternatives. The Intervenors did not oppose federal construction of the High Mountain Sheep Dam with conjunctive federal development of fish and wildlife resources in the Middle Snake River area. That plan was not specifically before the fishery Intervenors during the hearing procedure. (See Secretary's Petition for Intervention, especially pp. 14-16)

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G. *No Plan Including Lower Canyon Dam Should be Approved by the Commission*

Fishery considerations also militate strongly against the proposed Lower Canyon project. It is the view of the Secretary of the Interior that the natural resources of the Middle Snake River should be developed to their fullest

extent for the benefit of and utilization by the general public. This includes recreation and fish and wildlife as well as flood control, navigation, and other public benefits. The construction of Lower Canyon dam in the main Salmon River, upon which the Examiner relies in holding that the PNPC plan is superior to the WPPSS plan, would in truth be destructive of a sound comprehensive plan for this portion of the waterway. It would directly impair the fishery resources of the Salmon River.

The plan of the Department includes the development of the fish and wildlife resources of the Salmon River by the Department of the Interior and the State of Idaho so that the potential of the salmon and steelhead can be realized. Extensive research is being conducted through the cooperation of the Idaho Fish and Game Department to determine improvements necessary for proper management and development of the salmon and steelhead of the Salmon River.

Planned projects include the improvement of spawning areas and their protection to prevent abuse and destruction, artificial propagation where deemed necessary, and water control in the head waters.

Optimum development of the Middle Snake River area from any one resource standpoint is not possible and the fishery potential cannot be realized with the construction in the Salmon River of dams of any size which would impede the migration or destroy salmon spawning areas.

H. *Nonfederal Development of High Mountain Sheep Would Not Fulfill the Area Recreation Potential*

The Examiner has failed to give the recreation potential of this site a fair and ample consideration. He has adopted

the contentions of staff counsel that the plans offered are of equal value. (Dec. p. 30)

In the eleven pages of the Decision devoted to discussing the proposed federal development, no consideration was given to the benefits to be derived from federal development of the recreational values of the site. The only points considered by the Examiner with reference to federal development were those brought to his attention by the letters from the Secretary. Again, no independent consideration

was given to the question recognized by the Examiner as basic to this proceeding—"Whether a private applicant would adequately develop *all* the benefits that should be derived from the proposed site." (Dec. p. 17). (Emphasis supplied.)

An outstanding, highly scenic and attractive recreation area is involved. It includes much of the deepest and most rugged part of the Grand Canyon of the Snake, one of the most spectacular canyon areas of the entire North American continent. With a reservoir length of 58 miles on the Snake and 10 on the Imnaha, it is extremely rich in scenic, geologic, and water-land recreational values. This canyon had been considered more than a generation ago as worthy of investigation with a view to National Park status because of these outstanding scenic and geologic qualities. In more recent years intensive studies by the National Park Service determined that National Recreation Area status was warranted for the reservoir that would have been formed by the federal high-dam Hells Canyon project immediately to the south of the reach now in question.

The High Mountain Sheep reservoir portion of the canyon is fully as spectacular, scenically and geologically,

as the Hells Canyon portion and it has an added feature in the deep side canyon

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of the Imnaha. It is also more readily accessible to people and travelers in the more densely populated areas of the Pacific Northwest region to the north and west of the dam-site. National Recreation Area status may be assumed for a federal High Mountain Sheep project area. This is particularly likely in view of the elimination of the Hells Canyon area as a continuous water reach by the licensing of the Idaho Power Company's three-dam project.

The projected estimate of expense in adequate development of the site by the recently constituted Bureau of Outdoor Recreation is approximately $15,000,000. Justification for an expenditure of this magnitude is found in the needs of an expanding population invested with a degree of mobility not anticipated or remotely foreseen a decade ago. New recreation areas must be constantly sought and properly planned, constructed and maintained to provide for this need.

Under this extremely rapid and continuing growth of outdoor recreational need in the United States, specific requirements of such a recreation area can hardly be anticipated with any degree of precision. Certainly they cannot be determined at this time and reduced to a license provision which would meet public needs and

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interests over a period of years. Recreation investigations, plans, improvements, facilities and services must be evolved, over a span of time, on a flexible and purposeful basis.

The record in this case does not include a plan of federal recreation development for purposes of comparison. It

does include brief descriptions of recreation facilities which may be provided under the PNPC project if approved. It would be difficult, as indicated, to pass on the adequacy of such facilities in advance. It is evident, however, that any such fragmentary plans are not likely to meet the long-term requirements and standards of a National Recreation Area.

The proprietary interests of the people of the United States are highly significant in any proper choice between the alternatives of federal and nonfederal development and operation. The waters of the reservoir belong to all of the people. Over seven-eights of the 136-mile shoreline is under national ownership and administration.

Under these conditions it must be apparent that, in the public interest, the dam and reservoir, with its very extensive public proprietorship and recreation values and uses, cannot be turned over to a nonfederal entity whose interest lies in the exploitation of public hydropower resources for its own use and benefit and not

in recreation. The Federal Government would meet the situation and its public responsibilities. A nonfederal owner with limited responsibility in the field could hardly be required to perform with comparable effectiveness in meeting extraordinary public needs for recreation facilities and services.

I. *No Regional Power Shortage Necessitates Immediate Construction of This Project*

The Examiner concludes that a license for the High Mountain Sheep project must be granted at this time because the companies comprising PNPC will have a deficiency of assured resources as against estimated load as of 1967-68. The record before the Commission, including

those matters of which the Commission may take official notice, clearly indicates, however, the adequacy of assured resources in the Pacific Northwest at that time.

PNPC has not demonstrated a need for the output of the High Mountain Sheep project. The record shows, instead, that the immediate construction of this project would produce an excess of power in the Pacific Northwest which would cause large losses upon the system operated by the Bonneville Power Administration, and serious harm to the economy of the Northwest.

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Subsequent to the decision herein, Congress has appropriated funds for Little Goose in the Snake River Basin and has authorized additional facilities, Bruces Eddy and Asotin, to be constructed in the Columbia River Basin. In addition to the hydroelectric projects so authorized, the Hanford project, which will utilize by-product energy of the New Production Reactor, was authorzied by Congress on September 26, 1962. This alone will make available to the private companies an additional 400 megawatts of power. Also, subsequent to the hearings, FPC has licensed two major hydroelectric projects, Wells and Boundary.

The availability of Canadian storage may add materially to the prime power of all downstream Columbia Basin projects—federal and nonfederal. (Tr. 10,568, 10,627). Power resulting from projects constructed because of ratification of the Canadian Treaty, authorized projects not yet under construction, and proposed interconnections with the Pacific Southwest would also serve area load requirements including the needs of the private utilities.

Testimony on behalf of PNPC consistently underestimated the power resources that will be available to meet regional loads. Such testimony indicated that the companies' resources did not include

Bonneville power beyond 1964-65, or the full effects of Canadian storage. (Tr. 2327, 2334). PNPC treated the benefits of Canadian storage as if confined to the private companies' share of three nonfederal projects on the Columbia. (Tr. 2301-03, 2327, 2334, 2357). However, the pertinent fact is the total increase in regional power resource.

Witnesses for PNPC referred to the inability to serve the requirements of their member companies unless High Mountain Sheep is constructed by PNPC. (Tr. 1669-70, 2301-07, 2357). To support this contention they assumed that no Bonneville power would be available after five years and that withdrawable power purchased from public bodies was temporary. In these assumptions they were, in effect, considering the PNPC companies as a system operated in isolation from the rest of the area. The fact is that the Pacific Northwest pools its power supply. Any resource additions to the federal system, whether from hydroelectric plants or from interconnections, add to the region's overall capability. With new additions to the federal system, the possibility that any five-year withdrawal notices will be issued requiring curtailment of service to

private utilities is extremely remote.

Until Hanford was authorized, a shortage was anticipated in 1965-66. According to the 1962-63 BPA Advance Program, estimated Hanford generation will now eliminate this shortage and estimated loads will be served in 1966.[30]

[30] While the Advance Program is not in evidence, the Commission may take official notice of it since it is prescribed by Executive Order No. 9384, Oct. 4, 1943, 8 F.R. 13,782. And see Budget Bureau Circular A-35, revised Dec. 15, 1961.

In 1967-68 the area will be faced with surplus resources of over 700,000 kilowatts if Canadian storage is constructed. The BPA Advance Program for 1962-63 demonstrates conclusively that present and projected resources will adequately meet the Pacific Northwest regional loads through 1972 even without Canadian storage. With Canadian storage the time would be extended at least another two years.

The construction of Canadian storage facilities will have a profound impact upon all power needs, resources and programs of the Pacific Northwest. Here again the Examiner wholly ignored the realities of power supply in the Pacific Northwest. The Canadian Treaty facilities, when consummated by the construction of the three Canadian storage projects and Libby Dam, will add 2,000,000 kw in power resources to the existing system. Approximately 26

percent of the increase in power resources from the three Canadian storage projects alone will be added to the downstream projects owned by nonfederal agencies.

When the Parliament of the Dominion of Canada reconvened in September 1962, the Speech from the Throne made reference to the pendency of this Treaty and stated that the Dominion Government had changed its attitude toward the exportation of power to the United States. Prior to this announcement, it had been the attitude of that government to oppose such exportation of power. The changed position of the government indicates that the decision as to whether Canada will ratify the Treaty may be dependent upon the marketability of the Canadian entitlement to Treaty power in the United States, which would add 1,300,000 kw to be disposed of through the pooled resources of the Pacific Northwest.

We believe that the foregoing demonstrates that fear of the invocation of the five-year-pull-back provision of § 5(a) of the Bonneville Project Act is unwarranted. Not once in the history of the Bonneville Power Administration has it been necessary to invoke a pull-back from the private utilities. While the present state of the

law precludes a written guaranty of more than five years, it by no means follows that the utilities and the Commission should thereby blind themselves to the facts of regional power availability.

Should the Commission feel that the existence of the pull-back provision hangs like the sword of Damocles over the utilities, there is a much simpler remedy than the scuttling of the comprehensive development of the Columbia River Basin which the Examiner has recommended. The obvious solution would be a Commission recommendation to Congress under § 7(b) that would couple long-term sales to the utilities with federal authorization of the High Mountain Sheep project. In its recent action on Hanford, the Congress provided for long-term private utility participation in the output of a major addition to the region's power resources.[31]

The region's economy pays for the cost of power, and it pays whether the power is used or wasted. If the Pacific Northwest is to take full advantage of one of its greatest resources—hydroelectric

energy, its utilities must look not only to their own needs but to the orderly and economic development of the area's hydro resource.

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[31] See P.L. 87-701, September 26, 1962, § 112(c).

From a regional, as well as a national standpoint, it makes sense for the utilities of the Northwest to encourage the scheduling of federal multi-purpose hydroelectric projects ahead of various higher cost nonfederal projects. Power produced at federal multi-purpose projects normally costs less than nonfederal power produced at plants built for the single purpose of power production.

If the Canadian Treaty is not ratified and if industrial loads development as forecast, Knowles will be needed by 1971-72 and High Mountain Sheep by 1972-73. The economic and orderly development of hydroelectric projects at remaining sites will depend upon the coordinated scheduling of new projects by all Northwest electric utilities and agencies—federal and nonfederal, public and private.

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IV

THE SECRETARY EXCEPTS TO THE PRESIDING EXAMINER'S CONCLUSION THAT THE PUBLIC INTEREST IN COORDINATION OF THE HIGH MOUNTAIN SHEEP PROJECT WITH OTHER PROJECTS IN THE COLUMBIA RIVER BASIN WILL BE AS FULLY PROMOTED AND PROTECTED BY THE ISSUANCE OF A LICENSE WITH APPROPRIATE CONDITIONS AS BY FEDERAL DEVELOPMENT. IN THIS REGARD, EXCEPTION IS TAKEN TO THE FOLLOWING:

A. The finding that the Northwest Power Pool machinery provides for coordination, hydraulically and electrically, with the storage plants of the Federal system so as to provide for maximum prime energy in the system as a whole under periods of critical water flow.

B. The failure to require coordination and integration of the project with the existing Federal system in the

Columbia River Basin so as to provide maximum prime energy in the system as a whole.

C. The finding that coordination among Federal agencies is as difficult as coordination between Federal and nonfederal owners and operators.

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IV

Full Coordination of the Federal Government's Hydroelectric Facilities With the High Mountain Sheep Project Is Possible Only if the United States Constructs and Operates the Project

The cardinal principle which governs the operation of an electric power system is that all interconnected generating plants should be operated as if one utility owned the entire system.[32] This is a difficult concept to effectuate even under the most favorable circumstances. The greater the diversity of ownerships which must be brought into coordination as a system, the more complex become the problems of operation. If all the plants in the system belong to the United States they can be operated to meet a common objective. This objective is to achieve maximum power production using the entire system as efficiently and economically as possbile in order to meet the region's needs.

The basic error of the Examiner in his several findings relating to coordination was his belief that High Mountain Sheep and the projects of the federal government downstream therefrom could be operated as efficiently and economically under diverse ownerships as they could under single ownership. This is simply not so.

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[32] See "coordinated system operation" in FPC Glossary of Power Terms.

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The system developed and owned by the Federal Government is already fully integrated for the purpose of generating as much power as possible. The chain of federal dams below High Mountain Sheep is a basic component of this integrated system. It is imperative in the highest degree that the operation of all the plants in the system should be coordinated into a unified water and power control system. This is made necessary both by the laws of economic necessity, and the statutes of Congress under which the system has been established.

A major part of the evidence presented to the Commission by both PNPC and WPPSS relates to coordination of their proposed power plant with the other power plants in the region. While these parties recognize the importance of this need, the coordination which they propose is considerably less than that achieved among federal projects. The power produced in the aggregate at all of the federal projects is the keystone of the pooled power of the Northwest. All of this power is dispatched from a common dispatching board operated by Bonneville Power Administration and placed in operation under the Bonneville Project Act.

The ownership of High Mountain Sheep by either applicant would increase the difficulty of attaining full coordination. In the long run, the operation of the plant even under the most enlightened conditions

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would produce less benefits to the region than if the High Mountain Sheep project were operated as a part of the federal system. Examination of this record discloses in hundreds of places that those who seek the license are thinking of the project primarily as something for the bene-

fit of its owners and, secondarily for the benefit of the region. Operation of the project primarily for the benefit of its owners would be inherent conflict with fully integrated system operation. Any further Balkanization of the Pacific Northwest power system will limit the economic growth of the region and decrease beneficial effects of any increment to the system. The disintegration of the system's ownership would hasten the ultimate disintegration of the system itself.

The High Mountain Sheep Project will be a storage project. A Storage project exists to produce power at site and to provide hydraulic benefits which may be converted into power downstream. In the case of the High Mountain Sheep project the downstream plants which should be benefited by this storage are all federal. This geographic fact requires coordination of the High Mountain Sheep power plant with the downstream projects in order to obtain maximum production of power in the aggregate at site and downstream.

Proper integration of the High Mountain Sheep storage project would add materially to the firm power which each downstream project could produce. Each downstream power plant has been engineered to take advantage of the regulated flow which the storage facilities could maintain. There is inherent conflict between the private goal of maximum power production at site and the greatest unified system power production at site and downstream.

The evidence before the Commission demonstrated that there are different degrees of coordination. (Tr. pp. 646-48). The hydraulic engineering evidence introduced by WPPSS was presented on the basis of two different methods, styled "coordinated operation" and "ultimate integra-

tion." The latter method assumed that all resources in the Pacific Northwest would be operated on a fully integrated basis to meet all loads in the Pacific Northwest as if one utility owned all the resources.

The exhibits filed with reference to the Nez Perce Project showed that the difference in downstream benefits between "coordinated operation" and "ultimate integration" would be 143,000 kw. The joint exhibit prepared by both applicants with reference to the High Mountain Sheep project showed a range in downstream benefits between 34,000 kw and 180,000 kw, depending upon the degree of integration.

The substantial difference indicates the potential loss to the region which could result from failure to operate on the fully integrated basis which the federal government uses for the operation of its own plants as a matter of course.

Basin or system-wide integration has the same fundamental purpose as downstream integration. Operation of a storage project within a basin system electrically unified for maximum system output may require loss of power production at a given site. The needs, loads, and capacities of the entire basin-wide federal system may demand, for greatest economic benefit, that the project spill or alternatively store without consideration of the loads of that particular project. System demands may call for project operation in a manner totally inconsistent with the objective of maximum production at the project. These are factors that require much more rigid coordination than that set out in the findings of the Examiner.

The specific article requiring coordination of the High Mountain Sheep power plant with the Northwest Power Pool is patently inadequate to effect even minimum co-

ordination benefits for the region as a whole. (Dec. Art. 38, p. 111).

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The Northwest Power Pool is not an agency with authority to execute contracts. It is not even a legal entity. It is an association of power producers in the Pacific Northwest. A condition requiring coordination with the Power Pool would leave many unanswered questions. Would this mean that any member of the Power Pool could defeat the condition by refusing to join in a contract with the licensee for coordinating its particular facilities with those of High Mountain Sheep? Would it mean that the licensee could effectively comply with the condition by selecting any one of the members of the Pool and executing a contract with it? Could PNPC comply with the coordination article simply by entering into a contract with its four parent companies to coordinate with them, since all of these companies are members of the Northwest Power Pool?[23] If so, could PNPC coordinate in such a manner as to completely cut off the backbone of the Northwest Power Pool, the interconnected federal plants on the Columbia and Snake Rivers, from the downstream benefits which they would otherwise receive from proper coordination?

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We insist that the Pacific Northwest with its broad areas of diverse geographic character and its Columbia River system has unique natural advantages which cannot be fully realized if each power project is operated as an individual unit. The best way to insure ultimate integration of the projects is to have the High Mountain Sheep project au-

[23] Under a similar condition in the Idaho Power Company license for the Brownlee Project, the licensee claims to be complying with the article by reason of two contracts which it has made with Pacific Power and Light Company and Washington Water Power Company.

thorized for construction by the United States. No matter how wise the conditions which may be imposed in a license, they would less fully protect the public than would federal development.

One of the findings of the Examiner with reference to coordination is particularly unsound. He has found that coordination between federal agencies is at least as difficult as coordination between federal and nonfederal owners and operators. (Dec. p. 89).

This conclusion is self-contradictory. It is like saying that coordination among the member nations of NATO is at least as difficult as coordination between NATO and the Soviet Union. There is a generic difference between the difficulties which inhibit coordination among federal agencies and those which prevent federal and nonfederal coordination. Difficulties among federal agencies involve competing public needs. They arise from differences among the various agencies as to which segment of the public interest deserves priority.

The difficulties which separate the Federal Government and a nonfederal owner are totally different. They arise from an inherent conflict between public needs and the quest for private profits. More explicitly, flood control, reclamation, recreation and fish passage, to name but a few, are ends in themselves to the Federal Government and the various federal agencies responsible for them. To PNPC they are merely the means to an end, that end being the production of power for sale at a profit.

Four of the five agencies listed by the Examiner to illustrate the difficulties of coordination within the federal system are within the Department of the Interior. The conclusion that problems of coordination will be resolved

only at the presidential level is erroneous. In fact, hundreds of day-to-day problems of coordination are resolved at the dispatching board by ten-minute discussions between dispatchers.

If intramural difficulties exist, the addition of a private owner will do nothing to solve these differences, but only add to them. Assuming, *arguendo*, the validity of the Examiner's premise that coordination between federal agencies is difficult, it is an argument *against* the possibility of effective coordination between the Federal Government and a nonfederal owner; not, as the Decision speciously concludes, an argument in its favor.

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REQUESTED SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the basis of the foregoing exceptions and in conformity with the existing state of the record and the matters of which the Commission may take official notice, the Secretary of the Interior proposes the following Findings and Conclusions in lieu of the Additional Findings of the Presiding Examiner:

1. The proposed nonfederal development of the High Mountain Sheep project would adversely affect existing federal facilities downstream from the proposed site.

2. The merits of federal development of the High Mountain Sheep site should be thoroughly investigated and and evaluated to determine whether a formal recommendation for federal development should be made to Congress.

3. Neither of the proposed plans of the applicants herein is best adapted to a comprehensive plan which has

as its objective the orderly development of the waterway for the use or benefit of interstate or foreign commerce, for the improvement and

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utilization of waterpower development, and for other beneficial uses including recreation.

4. The public interest in the coordination of the High Mountain Sheep project with other projects in the Columbia River Basin will not be fully promoted and protected by the imposition of conditions upon the issuance of a license for nonfederal development.

5. The applications of PNPC and WPPSS for license should be denied.

If the findings and conclusions above set forth are rejected by the Commission and a license issued, the Secretary of the Interior respectfully proposes adoption of the following conditions upon the issuance of the license:

A. That any license issued herein be subject to the condition that the project be fully integrated and coordinated with the existing federal system at no cost to the federal Government, and that such coordination, integration and operation be under the control and supervision of the dispatchers for the federal system in the Pacific Northwest;

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B. That any license issued herein be subject to the condition that the licensee construct, operate and maintain, at its own expense, such fishways as may be prescribed by the Secretary of the Interior; and

C. That the proposed conditions above set forth, and such other and further conditions as may be recom-

mended by the Secretary of the Interior and adopted and imposed by the Commission, be made irrevocable.

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CONCLUSION

The waters of the Columbia River System are a great natural resource belonging to all of the people of the United States. The people through their national government have invested more than three billion dollars for the development of the many public benefits to be derived from the proper utilization of this resource.

The applicants herein seek a license from the Commission for the construction of a major water development structure for the primary purpose of producing hydroelectric power. Nonfederal operation of this structure would adversely affect the maximum utilization of the existing federal power system.

In contrast, federal construction and operation at an appropriate time would materially increase the many public benefits already derived from federal development of the Columbia River system.

The Commission, as a guardian of the public interest in the Nation's great waterways, should deny the license applications and recommend the project for eventual federal development.

WHEREFORE, the Secretary of the Interior, Intervenor, respectfully requests that the Decision of the Presiding Examiner issued October 8, 1962, be reversed and an order issued in compliance

with the findings and conclusions herein proposed. A motion for oral argument is appended hereto.

Respectfully submitted,

/s/ STEWART L. UDALL,
Secretary of the Interior
Intervenor

/s/ FRANK J. BARRY
Solicitor of the Department of the Interior
Washington 25, D. C.

/s/ EDWARD W. FISHER
Deputy Solicitor of the Interior
Washington 25, D. C.

/s/ EDWARD WEINBERG
Room 6413, Interior Building
Washington 25, D. C.

/s/ HARRY J. HOGAN
P. O. Box No. 3621
Portland 8, Oregon

/s/ LEON JOUROLOM
P. O. Box No. 3621
Portland 8, Oregon

Counsel for the Secretary of the Interior
Intervenor

27902

Motion of Stewart L. Udall, Secretary of the Interior, for Oral Argument

To the Honorable

The Federal Power Commission:

Comes now Stewart L. Udall, Secretary of the Interior, Intervenor in this Proceeding, and moves that oral argument be held before the Commission.

The important issues respecting the future growth and development of the Columbia River Basin before the Commission in this Proceeding warrant oral argument in order that they may be fully and adequately presented to the Commission.

Respectfully submitted,

STEWART L. UDALL
Stewart L. Udall
Secretary of the Interior
Petitioner

FRANK J. BARRY
Frank J. Barry
Solicitor of the Department of the Interior
Washington 25, D. C.

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[Docketed March 11, 1963]

Excerpts Reply of Pacific Northwest Power Company to Exceptions of Secretary of the Interior

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TABLE 3

PACIFIC NORTHWEST POWER COMPANY
Summary Comparison of Loads and Resources of Pacific Northwest Region
Northwest Power Pool less Utah Power & Light Co. and B. C. Hydro & Power Authority
1936-37 Water Conditions

Figures are Energy in Average Megawatts During Critical Storage Control Period

	1969-70	1970-71	1971-72	1972-73	1973-74	1974-75	1975-76
Area Load	11,136	11,702	12,309	12,948	13,620	14,327	15,070
Resources							
Existing Resources (a)	9,248	9,248	9,248	9,248	9,248	9,248	9,248
Additional Scheduled Resources							
Green Peter & Foster	42	42	42	42	42	42	42
Lower Monumental (a)	167	167	167	167	167	167	167
Little Goose	154	154	154	154	154	154	154
Bruces Eddy	-	213	446	446	446	446	446
Boundary	407	407	407	407	407	407	407
Sultan	4	38	38	38	38	38	38
Packwood Lake	6	6	6	6	6	6	6
Hanford	680	680	680	680	680	680	680
Wells	258	258	258	258	258	258	258
Subtotal	1,718	1,965	2,198	2,198	2,198	2,198	2,198
Total Resources	10,966	11,213	11,446	11,446	11,446	11,446	11,446
Surplus (Deficiency)	(170)	(489)	(863)	(1,502)	(2,174)	(2,881)	(3,624)

(a) Per PNPC Exhibit 42

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Table 3

TABLE 4

PACIFIC NORTHWEST POWER COMPANY
Summary Comparison of Loads and Resources of Organizing Companies
Reflecting Potential Resources Resulting from Construction of Hanford and Wells
1936-37 Water Conditions

Figures are Energy in Average Megawatts During Critical Storage Control Period

Operating Year	Firm Energy Resources				Energy Load	
	Firm Resources (a)	Hanford (b)	Wells (c)	Total Firm Resources	Load (a)	Deficiency
1965-66	2,208	194	-	2,402	2,761	359
1966-67	2,208	272	-	2,480	2,934	454
1967-68	2,198	272	128	2,598	3,118	520
1968-69	2,198	272	128	2,598	3,316	718
1969-70	2,198	272	128	2,598	3,526	928
1970-71	2,198	272	128	2,598	3,749	1,151
1971-72	2,198	272	128	2,598	3,986	1,388
1972-73	2,198	272	128	2,598	4,238	1,640
1973-74	2,148	272	128	2,548	4,506	1,958
1974-75	2,148	272	128	2,548	4,791	2,243

Notes: (a) From PNPC Exhibit 28, Sheet 6
(b) Represents 40% of 680 MW (800 MW at 85% Plant Factor)
(c) Represents 49.5% of Wells Project 258 MW

28744

[Docketed Feb. 5, 1964]

Opinion No. 418

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

PACIFIC NORTHWEST POWER COMPANY — Project No. 2243
WASHINGTON PUBLIC POWER SUPPLY SYSTEM — Project No. 2273

Opinion and Order Granting License

. . . . . .

28745-28748

APPEARANCES

. . . . . .

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Opinion and Order Granting License

Ross, Commissioner:

This is a proceeding under Part I of the Federal Power Act involving applications by Pacific Northwest Power Company (PNPC) and the Washington Public Power Supply System (WPPSS) for a license to build a hydroelectric project on the Snake River at the confluence of the Salmon River on the Idaho-Oregon border. PNPC proposes to build a project at the High Mountain Sheep (HMS) dam site above the Salmon, and WPPSS proposes to build a project at the Nez Perce dam site just below the Salmon, and alternatively, an HMS project.[1] The Secretary of the Interior, Intervener, urges that both applications be denied and federal construction be recommended. The proceeding is before the Commission upon

[1] See Map, Appendix A.

exceptions[2] to the examiner's decision issued October 8, 1962, recommending a license to PNPC for the HMS project.

PNPC is an Oregon corporation qualified to do business in Oregon, Idaho, Washington, and Montana. It is a wholly owned subsidiary of four sponsoring companies, The Montana Power Company, Pacific Power and Light Company, Portland General Electric Company, and the Washington Water Power Company and was formed in April of 1954 for the purpose of providing a supplemental source of power to meet the future requirements of these companies. It does not itself own or operate any electric facilities.

WPPSS was created, as a joint operating agency, composed of 16 public utility districts of the State of Washington, pursuant to an order of the Department of Conservation and Development of the State of Washington dated January 31, 1957, and, under the laws of the State of Washington, is a municipal corporation. It was established for the purpose of acquiring, constructing, and operating electric generating and transmission facilities. It does not own or operate any electric facilities.

The history of these proceedings began April 8, 1955, when PNPC was granted a preliminary permit effective April 1, 1955, for a period of three years for Project No. 2173 consisting of the Mountain Sheep Development at river mile 192.6 and the Pleasant Valley Development at river mile 213.2 both on the Snake River above the confluence of the Salmon and the Imnaha thereby limiting to

[2] Filed by Idaho Fish and Game Commission, Oregon State Game Commission and Fish Commission of Oregon, WPPSS, PNPC, staff of this Commission, and the Secretary of the Interior.

the greatest extent possible impact on the Columbia River salmon run (14 FPC 644). PNPC filed an application for a license for this project on September 7, 1955, but the license was denied by the Commission on the ground that any combination of projects which included Nez Perce was consistently superior to any combination of projects which did not include Nez Perce (19 FPC 127, 131).

Thereafter PNPC filed an application for rehearing and stay of the Commission's order in which it asked for time and opportunity to determine what modifications of the project would accord to the determination of the Commission as the best comprehensive development of the resources involved. On March 20, 1958, just prior to the expiration of the three-year permit on March 30, the Commission issued an order denying rehearing and stay with the notation that an opinion and order would be issued later. It was in this situation that PNPC filed its application for a license for the High Mountain Sheep Development, identified as Project No. 2243, located between the confluences of the Salmon and the Imnaha at river mile 189.2 on the Snake. The filing was thus made within the three-year period specified in the permit. It was not until April 11, 1958 (19 FPC 353) that the Commission issued its opinion and order on rehearing in which it generally reaffirmed its decision on the superiority of Nez Perce over the applicant's Mountain Sheep-Pleasant Valley project.

On June 27, 1958, PNPC filed a petition requesting a declaratory judgment that the preliminary permit issued April 8, 1955, continued in force and effect, that the application for license in Project No. 2243 was filed in accordance with the preliminary permit, and that the preliminary permit maintained priority of application. This petition was withdrawn on September 28, 1959, with the explanation that the purpose for which the petition was filed was moot.

On March 15, 1960, WPPSS filed its application for the Nez Perce Project at river mile 186.2. Hearings were held in Washington and at Portland, Oregon from November 4, 1960, intermittently to September 12, 1961. On April 24, 1961, WPPSS filed a motion for leave to file an amendment to its Nez Perce application to construct an alternate HMS project. This motion was denied by the examiner, who was affirmed by the

Commission on the ground that no good reason had been shown for the amendment at that stage (25 FPC 1004; 26 FPC 174). WPPSS, however, did introduce evidence on an alternative HMS project on rebuttal and at the end of the hearing moved to amend its application to include HMS. After the filing of voluminous briefs the examiner issued his decision October 8, 1962. He denied WPPSS's motion to amend and granted a license for PNPC's HMS project. Exceptions were filed to the examiner's decision as noted above including those by the Secretary of the Interior, who by order of December 14, 1962, was permitted to intervene out-of-time.

0/ Evidence was submitted by the parties with respect to the three principal projects proposed: PNPC's proposal for the HMS site and WPPSS's proposals for both Nez Perce and HMS. All three projects would involve large concrete arched dams, reservoirs extending up the Snake River, and also up the Salmon River in the case of Nez Perce, and powerhouses containing turbines and generators. The evidence included detailed data on these proposals with a number of variations. Evidence was also submitted setting forth plans for a comprehensive development of the Snake River including these projects. For instance, plans of comprehensive development involving HMS also include a dam known as the Lower Canyon

Project, on the Salmon River. Further details of the proposed projects and proposed plans of development will be discussed below. There is also evidence submitted on the need for additional power resources by the Pacific Northwest area and by the respective applicants. The evidence of regional resources took into account not only facilities in operation at the time the record was made, but also the effect of certain projects to be installed in the future including those to be built under the proposed treaty with Canada. We are also taking notice that since the close of the record additional projects have been scheduled including the Hanford atomic reactor which will supply power to WPPSS and private companies. On the basis of the evidence and the discussion below, we find that the HMS project is best adapted within the meaning of Section 10(a) of the Federal Power Act to a comprehensive plan for improving and developing a waterway, that PNPC should be given a license for the HMS project and that federal development should not be recommended.

THE PROPOSED PROJECTS AND PLANS OF DEVELOPMENT

An important preliminary question is whether a license should be granted for a project at the Nez Perce site or at the HMS site. This involves a consideration of the potentialities of each, including its adaptability to a comprehensive plan for improving the Snake and Salmon Rivers. While both PNPC and WPPSS submitted proposals for building a project at the HMS site, the physical differences between their proposals, as will be developed, are not so great as to make any appreciable difference in choosing between Nez Perce and HMS.

For the reasons set out below, we find that the HMS project and plan is preferable to the Nez Perce project and plan. The decisive difference between the two projects and their related plans is in their effect on the

fish problem. The Nez Perce project would adversely affect the fish runs on the upper Snake the Salmon and the Imnaha Rivers while the HMS project would not affect in any manner the fish runs on the Salmon River and its only considered impact would be on the fish runs on the Upper Snake where these runs are already impaired. In addition, the HMS project would undoubtedly have some impact on the smaller run on the Imnaha River. However, a canal proposed by PNCP as part of the HMS project would appear to have a substantial chance of continuing the existing fish runs.

The Nez Perce and HMS Snake River dam sites represent two of the most important remaining sites on the Columbia River system. As the attached map (App. A) shows, the Snake at the dam sites flows in a northwesterly direction between the states of Oregon and Idaho; the Salmon flows in from Idaho on the east side of the Snake. The Nez Perce site is at river mile 186.2 about 2.5 miles below the mouth of the Salmon, while the HMS site is at river mile 189.2 about eight-tenths of a mile upstream from the Salmon, but below the mouth of the Imnaha, which flows into the Snake from the west or Oregon side.

A. *Comparison of the Proposed HMS and Nez Perce Projects*

As proposed by PNPC the HMS project would consist of a concrete arch dam approximately 670 feet high from the river bed and would create a reservoir extending approximately 58 miles upstream on the Snake to the Hells Canyon dam site tailwater and 10 miles upstream on the Imnaha. The reservoir would have a gross storage of 3,600,000 acre-feet, of which 2,250,000 acre-feet would be usable with a normal drawdown. Two outdoor-type power

houses would be located one on each side of the river near the base of the dam. Each turbine would be connected to a generator rated 175,000 kw. There would be five units initially with a total installed capacity of 875,000 kw.[3] Ultimately there would be ten units with a total installed capacity of 1,750,000 kw. Initial capability would be 1,000,000 kilowatts, and ultimate capability would be 2,000,000 kw.

The HMS project proposed by WPPSS would also consist of a arch dam at the same site and a reservoir with the same capacity. In a number of respects, not necessary to relate here in full, engineering details of construction would differ from the project proposed by PNPC. For instance, an indoor-type powerhouse would be located on the Idaho side of the river near the base of the dam with an initial installation of six generating units, each rated 200,000 kw. Provision would be made to house four similar units in a future underground powerhouse on the Oregon side. Maximum initial capacity would be 1,200,000 kw and ultimate capacity would be 2,000,000 kw.

28753

As proposed by WPPSS in its application as amended in later testimony the Nez Perce project would consist of a concrete arch dam approximately 715 feet high. It would create a reservoir extending approximately 63 miles upstream on the Salmon, 61 miles upstream on the Snake to the Hells Canyon site tailwater and 10 miles upstream on the Imnaha. The reservoir would have a gross storage capacity of 6,000,000 acre-feet and usable storage of 3,130,000 acre-feet with a normal draw down. An underground powerhouse requiring an excavation would be located on the Oregon side of the river and would house the ten initial generating units rated 200,000 kw each or 2,000,000 kw

[3] Seven units were assumed for the purpose of company plans of comprehensive development.

in all. WPPSS plans underground powerhouse for the Idaho side of the river, which would have six more units, so that the total generating capacity of the project would be 3,200,000 kw.

(1) *Safety and stability of the dam sites and structures*—The parties have raised an issue as to the adequacy of the proposed sites for both of the proposed dams (as well as the Lower Canyon dam which is eventually to be part of an HMS plan, see pp. 9-10, *infra*.), but particularly with respect to Nez Perce. The difficulty is geological. The rocks of the area consist of the Columbia River basalts overlying what is known as the Seven Devils formation, consisting of strong metamorphosed volcanic and sedimentary rocks. As the Snake River cut down through these rocks, it permitted lateral stresses to cause complicated fracturing of the rocks. At the Nez Perce site, according to the evidence, the possibility exists that on the left side of the site looking downstream large blocks of rock might slide along a sloping fault plane, but there is also evidence indicating that this would probably not occur because of certain other blocks of rock standing in the way and because the apparent faults might actually be welded by metamorphism.[4] Evidence also indicates doubt about the Lower Canyon site at mile 3.7 on the Salmon River, and the evidence is not sufficient to remove all doubt with respect to the HMS site. What is needed before construction can be authorized at any of these sites is a complete geological study carried out by a more elaborate program of borings. It will be necessary to provide, as recommended by our staff, that the licensee of any of the above projects shall engage qualified independent experts to report on the dam site and the proposed design of the dam before we approve the design drawings for the dam structure. But we do not

[4] The change in structure of a rock as a result of heat, pressure or water.

believe that the evidence supports a finding that any of the sites are inherently unsafe or which would warrant a preference between Nez Perce and HMS on this basis. Specifically we agree with the examiner that the project structures proposed by PNCP and WPPSS for the HMS project can, subject to approval of final plans, be made safe and stable, but final designs should be subject to further tests and to our approval as ordered below.

28754

(2) *Costs and power benefits*—Although the record is burdened with conflicting estimates of costs for the HMS and NEZ Perce projects on various assumptions, it is clear enough as noted by the examiner, that both the HMS project, as proposed for construction by either PNPC or WPPSS, and the Nez Perce project proposed by WPPSS are economically feasible. Furthermore the record makes clear that Nez Perce, which is the most costly project and, at the same time, produces the most power, shows the greatest excess of annual power values over cost.

WPPSS shows a project cost of $391,080,000 for Nez Perce and $213,000,000 for HMS; PNCP shows a project cost of $185,700,000 for HMS; the staff shows $369,120,000 for Nez Perce, $229,743,000 for WPPSS's version of HMS and $200,231,000 for PNCP's version of HMS.[5] In each case there is an excess of power value over cost—$23,410,000 and $17,482,000 for the WPPSS and FPC analyses of Nez Perce using a cost of money of 4.75 percent and 4.5 percent respectively; $16,792,000 and $12,209,000 for the WPPSS and FPC analyses of HMS using WPPSS financing with a 4.5 percent cost of money; and $5,788,000 and

[5] These cost figures and those to follow relating to the cost of the respective projects reflect WPPSS's revision of figures used by the examiner, for we agree with WPPSS that all cost comparisons should be uniformly computed on the basis for cost and value at site as had been stipulated on the record with respect to comparative plans.

$4,267,000 using the PNCF and FPC analyses of HMS using PNCF financing with a cost of money of 6 percent.

Relying on the same project cost comparison evidence, the unit costs of energy to be generated by Nez Perce or the HMS project are not very different when approximately equivalent financing is used. Thus the cost per kwh is 2.7 and 2.5 mills for energy generated at Nez Perce and HMS using WPPSS figures and WPPSS financing, while the cost is 3.4 mills for either project using the staff figures and WPPSS financing. However, when the PNPC 6 percent cost of money is employed the unit cost per kwh for HMS rises to 3.5 mills under the PNPC analysis and to 4.2 mills under the staff analysis. The record does not directly show what the unit costs would be for Nez Perce power using PNPC's 6 percent financing.

We conclude from the cost comparison of the projects that Nez Perce is the project with the larger absolute excess of value over cost. However, assuming a common cost of money, the difference between the two projects with respect to the unit cost of the energy generated is not very great, even assuming WPPSS estimates, and non-existent assuming the staff's. PNPC's financing, compared to WPPSS's proposed financing, discussed further at Page 33 below, however, would significantly increase the cost of the power sold to the buyer. This is because PNPC would receive a return that would cover its cost of debt and provide an allowance on its equity capitalization. In addition PNPC would incur Federal income taxes. On the other hand assuming WPPSS could finance with 4.75 or 4.5 percent debt it would be paying less for its capital and would pay no Federal income tax.

28755

This, of course, does not mean that Nez Perce is for this reason the better project, but merely that if there were no

questions of priority and preference (which, of course, there are) this might be a factor favoring a WPPSS application for Nez Perce over a PNPC application for HMS, even if on the basis of comparable financing HMS was as good or better than Nez Perce. If, however, this kind of advantage were controlling as against a valid priority, we would in almost every case be required to grant the license to a municipal rather than a private applicant for a license. If this were so, the preference provisions in favor of states and municipalities in Section 7(a) of the Act would hardly be necessary, and the priority provisions of Sections 4 and 5 would be meaningless.[6]

(3) *Other benefits*—One of the benefits of either HMS or Nez Perce is the ability to store water and so lessen floods on the Columbia River. The initial flood control goal of the United States Corps of Engineers is to limit the flood flow on the Columbia at The Dalles to 800,000 cfs. This would require[7] 17.3 million acre feet of storage while the ultimate goal of a peak flow of 600,000 cfs at The Dalles would require 32.5 million acre feet of storage. The Corps report shows 8.3 million acre-feet existing or under construction. While the construction of Canadian storage[8] would add 8.45 million acre-feet and the Libby Project would add 5 million acre-feet to available storage, thus there still is an authorized use for further storage from a

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[6] As we understand it, one of the major reasons for the priority and preference provisions of the Act was to remove from Commission discretion the controversial issues as to whether competing public or private applicants could best serve the public.

[7] Corps of Engineers Report, March 31, 1961, p. 5.

[8] Canadian storage would be available upon the construction of certain projects on the Columbia River in Canada. The treaty between the United States and Canada providing for such storage was ratified by Congress in 1961, but not by the Canadian Parliament. A somewhat different arrangement for sharing the power benefits is now being negotiated.

project on the Snake where flood flows, with the Salmon, amount to 6.2 million acre-feet.

The usable storage for flood control at HMS would amount to only 2,250,000 acre-feet compared with 5,015,000 acre-feet at Nez Perce, so that considered only as project versus project the latter would clearly be preferable on this point. As noted below, however, this preference is somewhat diminished in value by the fact that the HMS plan of development would eventually also include 3,265,000 acre-feet of storage for the Lower Canyon development on the Salmon,[9] so that the HMS plan of development would provide usable storage of 5,515,000 acre-feet. The record indicates that either of the rival projects can be operated satisfactorily for flood control.

28756

The applicants have agreed on the annual values to be given their storage potentials. As of 1968 the value of the HMS storage is $1,840,000 compared to $5,300,000 for Nez Perce, but the Lower Canyon Project would add the value of $3,500,000 to the HMS plan. If Canadian storage becomes available, the value of HMS, Lower Canyon and Nez Perce storage would decrease to only $240,000, $370,000, and $560,000, respectively.

The record indicates that some of the recreational potentialities of the double Nez Perce reservoir are greater than for HMS, (or even for HMS with Lower Canyon). The large body of water created by the Nez Perce dam would provide greater opportunity for boating, camping, fishing, hunting and sightseeing than the HMS reservoir or the Lower Canyon reservoir, or both. However, these advantages are offset by the fact that the Nez Perce proj-

[9] Assuming this development at mile 3.7 with a reservoir elevation of 1595 feet.

ect would threaten recreational values of fishing for salmon and steelhead trout not only at the site of the reservoir but wherever fish originating on the Salmon River watershed may be caught from the headwaters to the ocean.

The record indicates that downstream navigation benefits achieved by controlled release of water would be of equal value with Nez Perce or HMS. The double reservoir of Nez Perce would permit greater scope for boating above the dam, but there is nothing to show that there is any importance in such navigation apart from recreation.

B. *Comparison of the Proposed Plans of Development.*

In determining whether to license HMS, Nez Perce, or neither, the Commission must make the required findings under Section 10(a) of the Federal Power Act providing in part as follows:

> That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial uses, including recreational purposes; . . . .

To meet the requirements of the statute plans were submitted by WPPSS, PNPC and our staff for the "common reach" of the river,[10] and these parties submitted costs and other data with respect to the plans and variations of them.

[10] Defined at the prehearing conference as extending from the tailwater of the China Gardens project at Snake River mile 172.5, elevation 845 to the normal pool elevation of the Hells Canyon project on the Snake River, elevation 1683 feet m.s.l., and to the normal pool elevation of the future Freedom project on the Salmon River, elevation 1780 feet m.s.l.

The evidence shows two major plans with variations, and they are mutually exclusive. One plan involves the HMS and related projects and the other plan involves Nez Perce, as well as additional projects. While these plans show the potentialities of development of either Nez Perce or HMS, the cost estimates of the parties respecting the same plan differ widely. Furthermore, as already indicated, more exploration is needed at the project sites so that final plans may differ from the estimates submitted herein. For this reason we do not find that the data submitted respecting these plans precisely represents the ultimate development of either plan, but we are satisfied that such estimates are approximately correct and do provide a satisfactory basis for comparing the two plans. We also note, as did the examiner, that there is no immediate proposal for the construction of projects incident to either plan other than the HMS and Nez Perce projects. Under these circumstances we think that the best way of exercising our responsibilities under Section 10(a) is to determine whether a grant of either the Nez Perce or HMS projects at this time would, the important time factor considered, preclude a superior development of the rivers involved.

The HMS plan consists of the HMS development on the Snake above the mouth of the Salmon, the Lower Canyon development utilizing an even larger head on the Salmon (either at mile 0.5 or 3.7), later possibly the Freedom project at mile 69.2 on the Salmon, and the small China Gardens development on the Snake some sixteen miles below the mouth of the Salmon. The Nez Perce plan consists of the large Nez Perce development on the Snake just below the mouth of the Salmon and the China Gardens development further down the river, either with or without the Freedom development and the Whitebird development, a

combination fish trap and generating facility at the head of the Nez Perce reservoir on the Salmon River.[11]

PNPC proposes an HMS plan with an arch dam at HMS and an arch dam at Lower Canyon, mile 3.7. PNPC also introduced evidence on a Nez Perce plan. It excludes the cost of fish facilities from its plans as impossible to estimate and excludes the Whitebird and Freedom developments as uneconomic until development of the Crevice project further upstream on the Salmon. However, it did include evidence of Whitebird costs. WPPSS presents a Nez Perce plan with an arch dam at Nez Perce with the Whitebird development and, eventually, the Freedom development included. Its HMS plan employs a rock filled dam at Lower Canyon at mile 0.5 on the Salmon and includes the Freedom project for future development.

28758

The staff originally presented comparative plans similar to those of PNPC, but on rebuttal proposed plans based upon an arch dam (the more economical type) at HMS, Nez Perce and Lower Canyon (mile 3.7), but did not include the relatively minor Freedom project or its costs.[12] We are of the opinion that the staff rebuttal presentation provides the most valid comparison between the two plans of development. However, the data presented by PNPC and WPPSS on power and costs are shown in the following table for informative purposes.

(1) *Power Production under the Proposed Plans*—The record shows that under most of the estimates, including

[11] No Whitebird development was proposed in connection with the HMS plan, for the Lower Canyon dam utilizes greater head and would flood the Whitebird site.

[12] Presumably since Freedom power and costs would be equally applicable to both plans and thus represents a "wash" item.

the staff's revised comparison which we are adopting as most reasonable, the installed capacity would be slightly greater under the HMS plan than under the Nez Perce plan as shown in the tables below:

	Installed Capacity (MW)		
	PNPC	WPPSS	Staff Revised[18]
HMS Plan (HMS, Lower Canyon, China Gardens)	2,180	2,315	2,347
HMS Plan (With Freedom and Crevice in operation)	2,700	2,315	..
Nez Perce Plan (Nez Perce, China Gardens, Whitebird)	2,062	2,235	2,268
Nez Perce Plan (With Freedom and Crevice in operation)	2,626	2,240	..

The record also shows that under most conditions and stages of development of the Snake and Salmon, with and without Canadian storage, the HMS plan would exceed the Nez Perce plan with respect to nominal prime energy (energy during the critical winter storage control period), average annual generation and plant peak capability. This power differential in favor of the HMS plan results from one intrinsic advantage. That is the reservoir elevation at Nez Perce (or HMS) must be limited to approximately 1510 feet so as not to interfere with the Hells Canyon site upstream, but the Lower Canyon dam can be built to produce a higher reservoir and greater power.

28759

(2) *Costs compared with power benefits under the rival plans*—Cost estimates for all projects were presented by

[18] Lower Canyon installed capacity of 910 MW and reservoir at elevation 1595.

PNPC, WPPSS, the Department of Conservation of the State of Washington and our staff. There were different original estimates and modifications of them leading to wide variations in cost resulting from different overall project layouts. A summary of some of the cost presentations is shown in the following table. The Freedom project, which would not change the difference in costs as between the two plans, is omitted from the figures. The figures reflect the HMS plan, as composed of HMS, Lower Canyon and China Gardens, and the Nez Perce plan, as composed of Nez Perce, China Gardens and Whitebird, shown on the previous table.

SUMMARY OF CONSTRUCTION COSTS ($1000)
COMPARATIVE PLANS FOR DEVELOPMENT OF MIDDLE SNAKE RIVER

	HMS Plan	Nez Perce Plan
Without Fish Facilities		
Staff (Revised)[a]	$443,089	$393,473[b]
PNPC (Direct)	405,673	403,098[c]
WPPSS (Rebuttal)	460,289	367,253[b]
With Fish Facilities[e]		
Staff (Revised)	500,022	471,963[d]
WPPSS (Rebuttal)	522,000	429,000[d]

[a] In making its revised presentation the staff actually used two different project layouts—in one a Harza design with all power plants located across the river, in the other a more economical design with power plants located parallel to the river. We are adopting this second comparison assuming also the Lower Canyon Dam will have installed capacity of 910 MW and a reservoir elevation of 1595 feet.

[b] Whitebird costs omitted because part of these costs were charged to Nez Perce fish facilities.

[c] Without Whitebird costs amounting to $38,592.

[d] Includes Whitebird costs.

[e] PNPC did not present evidence of the cost of fish facilities.

In each case the Nez Perce plan is the least expensive. Using the PNPC figures this difference is only $2,575,000 (excluding Whitebird and fish facilities in each plan), but using the WPPSS figure the difference is $93,036,000.

As the examiner points out, the difference in cost between the HMS plan and the Nez Perce plan on the basis of the staff comparison ($49,616,000 without fish facilities) is about midway between the difference between the two plans using the PNPC figures and the difference between the two plans using the WPPSS figures. Because the staff's study alone compares the two plans on similar bases, in our opinion it reflects the approximate difference in cost between the two plans.

Annual costs vary roughly with the construction costs, and these are shown in the following table.

ANNUAL COSTS ($1000)[a]

	HMS Plan	Nez Perce Plan
Without Fish Facilities		
Staff (Revised)	$28,337	$24,992[b]
PNPC (Direct)	26,103	25,298[c]
WPPSS (Rebuttal)	29,030	23,377[b]
With Fish Facilities		
Staff (Revised)	32,554	30,600[d]
WPPSS (Rebuttal)	33,373	27,865[d]

[a] Using stipulated operations and maintenance and administrative and general expenses.

[b] Whitebird costs omitted because part of these costs were charged to Nez Perce fish facilities.

[c] Without Whitebird costs amounting to $2,266.

[d] Includes Whitebird costs.

As the data reflect, the greatest excess of the HMS plan costs over the Nez Perce plan costs are shown by WPPSS and the least excess by PNPC without the Whitebird development. In fact, PNPC shows an excess of the Nez Perce plan costs over the HMS plan costs counting in the Whitebird development. The staff revised estimates, which we adopt, fall in between.

As shown in the joint exhibit filed by the parties, with Canadian storage available, the annual power benefits of

the HMS plan (HMS, China Gardens, Lower Canyon) are $56,649,000. By computation using the power values prescribed in the joint exhibit the power benefits of the Nez Perce plan (Nez Perce, China Gardens, Whitebird) also with Canadian storage amount to $54,367,000 per year. These figures and figures for other stages of river development both with and without Canadian storage show that the HMS plan produces greater power benefits than the Nez Perce plan. In any case annual power benefits exceed annual costs by substantial amounts for each plan, and we find they are each economically feasible.

28761

The staff and the examiner compared the difference between the two plans as to annual costs and as to annual values and dervied a net difference between annual cost and value for the two plans. The examiner found that using the staff's revised comparison the HMS plan is superior to the Nez Perce plan in a somewhat vaguely defined initial period, assuming the completion of Lower Canyon, but the Nez Perce plan is superior to the HMS plan in subsequent periods.

WPPSS objects to the propriety of the examiner's comparison arguing that the Lower Canyon project will not be in operation at the time the HMS project goes into service, that the China Gardens project will be delayed beyond the time either the HMS project or the Nez Perce project is completed, and that there is a premature assumption of seven units at HMS although the license application provides for five units. It is true that omission of the Lower Canyon project would show large net benefits in favor of the Nez Perce plan, the China Gardens development utilizes more head under the HMS plan and so favors that plan, and the more units at HMS, of course, the greater the benefits. Further, there is no question but that these

developments may be delayed. However (apart from the fish problem) there is no reason to believe that Lower Canyon would not be built in due time since the evidence shows that Lower Canyon is economic of itself, and if the Lower Canyon project had to be delayed or totally precluded on account of the fish problem so would Nez Perce.

In our view of these and other circumstance the only significant comparative analysis of the two plans is on the basis of the eventual results when all projects which appear to be feasible are built and fully developed. On this basis, as the examiner found, the Nez Perce plan is somewhat superior to HMS. But, taking into consideration the present values of an early start on some of the major projects of a plan, we conclude that this superiority is not so great as to preclude a grant for HMS if, as we shall explain below, other considerations exist which make feasible the commencement of HMS construction now, but which would necessitate an indefinite delay in any Nez Perce construction. Thus the HMS plan has the advantage of permitting an immediate start on major facilities which can bring additional power to the area while the fish questions which are common to Nez Perce and Lower Canyon receive further study.[14] Specifically, in the terms of the statute, we find that despite the somewhat greater advantages which might eventually result from adoption of a plan including Nez Perce over one including HMS, adoption for present grant of the HMS project rather than the Nez Perce project will, for the reasons detailed below, be best adapted to a comprehensive plan for developing the relevant portions of the Snake and Salmon Rivers.

[14] While the record is not complete on the point, there are indications that the fish problem with respect to a Lower Canyon dam will present somewhat lesser difficulties than those involved at Nez Perce, since the problems created by the intermingling of waters from two different rivers will not be present.

(3) *Other bases of comparison between the plans*—Flood control, navigation and recreation have already been discussed in connection with the Nez Perce and HMS projects. In general the differences between the two plans are not significant. Both plans will provide about the same navigation benefits, and substantial recreational benefits. The HMS plan produces a little more storage because the Lower Canyon dam can be built higher than Nez Perce, but the value of storage is reduced enormously in any case with the advent of the Canadian projects.

C. The Fish Problem in Connection with the Projects and Plans of Development.

One of the most controversial issues in this proceeding concerns the ability of the applicants to provide for the movement of anadromous fish by their proposed projects. These fish, salmon and trout, as fingerlings, migrate down the rivers to the ocean and several years later as adults migrate up the rivers to their natal headwaters to spawn. The problem here is to determine whether the upstream migrants, which normally progress by swimming and jumping, and the downstream migrants, which are ordinarily carried by the current, can be guided or carried over high dams and through reservoirs such as HMS, Nez Perce or Lower Canyon. Our responsibility for this problem arises from Section 10(a) providing that the project adopted by us will be "best adapted" for improving or developing a waterway for, among other things, "beneficial public uses, including recreational purposes." While the proposed projects and plans are largely designed to produce power, under the statute we are required to consider whether the power use is consistent with recreational and other beneficial public uses including the use of the

river for fishing and the production of fish for both sport and commercial purposes.

According to the record the Columbia River is the greatest producer of Pacific salmon and steelhead trout in the United States. The most abundant species is the chinook salmon, but blueback, silver salmon and steelhead trout are also important. There are three races of chinook salmon, the spring, summer and fall chinook. Of these, the spring chinook, whose most significant source is the Salmon River, are said to be the tastiest and bring the highest prices.

Columbia River salmon have been important in the development of the Pacific Northwest for almost a century. They are caught not only from the river and its tributaries, but also from the Pacific Ocean along the coast. The commercial catch of Columbia River salmon is estimated to be worth $12,000,000 annually and the sport fishing attributable to the Salmon River alone, while no exact estimate can be made, may be worth as much as $8 million a year. The latter figure is based on the amount fishermen spend for the privilege of taking the fish. The value of the fish, of course, cannot be measured alone by the amount spent to take them or the value of the fish as food. Nor can the value be measured by the

economic growth stimulated by sport and commercial fishermen. The record and the contentions of the fisheries' interests make it clear that conservation of the fish is an important public end, and we so find.[15]

[15] We note in this connection that parts of the Salmon River are included in a wilderness area by the Secretary of Agriculture, which is the subject of the Wilderness Bill, S. 4, the purpose of which is to preserve wilderness areas for the good of the whole people. Hearings before the Senate Committee on Interior and Insular Affairs on S. 4, 88th Cong., 1st Sess., pp. 275-276.

While the estimating methods employed are subject to inaccuracies, the record shows that a much larger number of fish would be adversely affected by the Nez Perce dam than by the HMS dam. The witness for the Idaho Department of Fish and Game prepared a study based on a count of the fish passing the McNary dam on the Columbia River and an allocation of the fish to the various tributaries. The allocation was based on recovery of a certain number of tagged fish after death in the headwaters and on a comparison of sports catches at various points. The highest year's count for each species was used in arriving at total fish. The study shows 619,750 spring and summer chinook, fall chinook, blueback and steelhead counted at McNary of which 264,200 are estimated to reach the Nez Perce dam site. Of this number 152,700 are spring and summer chinook, of which all but 10.9 percent turn into the Salmon River. All of the 9,000 bluebacks also use the Salmon River, as well as 74.1 percent of the steelheads. On the other hand 85.7 percent of the 35,000 fall Chinook continue up the Snake. Thus out of the total 264,200 reaching Nez Perce 75.7 percent are estimated to migrate up the Salmon and the 24.3 percent up the Snake, including 5.7 percent up the Imnaha.

WPPSS criticizes the derivation of these figures arguing that they are not accurate enough on which to base a decision. While no actual counts were made of the fish passing the Nez Perce and HMS sites and the estimates were based on small samples of tagged fish and questionnaires sent to a fraction of the sports fishermen, the estimates are accurate enough to be of significance because based on data systematically compiled and reasonable inferences. According to the record an actual count on the Snake or Salmon would be inordinately expensive. In our opinion the study referred to above in comparison with the record is sufficient to show that the Salmon River has been

and still is of great importance for migrating fish, but that the Snake is now of much less importance.

The applicants have not been unaware of this fish problem and have designed their projects in an attempt to solve it. At Nez Perce WPPSS plans facilities for upstream passage including a picketed barrier below the dam leading to a fish ladder 273 feet high, which in turn would lead to lock chambers where the fish would be subjected gradually to increasing water pressures and would be discharged into the reservoir 363 feet below the surface. The downstream migrants would be caught in traps in the

form of V-shaped louver structures at the Whitebird barrier on the Salmon River and the Imnaha barrier on the Imnaha River, and would then be transported to Nez Perce by barge. A floating skimmer device would also be provided in the forebay of the dam. WPPSS would provide similar facilities at HMS.

The facilities planned by PNPC for upstream migrants at HMS include two fish ladders. One ladder would reach a canal extending 17 miles up the Imnaha River. The other would extend to a point on the dam from which hoppers would carry the fish over the dam and into the reservoir. Downstream Snake migrants would be delivered at the proposed Hells Canyon loading station for transfer by barge to the dam. Downstream Imnaha migrants would be guided by the Imnaha fish barrier to the Imnaha canal and discharged below the dam.

The fish facilities proposed for both upstream and downstream migrants offer a number of hazards. For upstream migrants there are uncertainties as to the operation of WPPSS's proposed barrier below its dam and its proposed fish lock particularly as to the effect of pressure

on the fish and whether they will leave the lock. However, the Imnaha canal proposed by PNPC would appear to have a substantial chance of success. The canal would carry only Imnaha water and the fish ladders leading to it would carry principally Imnaha water (except for the introduction of Snake River water at one point on the ladder to attract any stray Snake River upstream migrants). The canal is proposed on the theory that the water from each stream has a distinctive chemical quality that is recognized by the fish spawned in that stream. There seems a good chance that the Imnaha canal will effect a segregation of the Imnaha fish in a natural manner compared with the confused situation discussed below that would develop in the reservoir above the Nez Perce dam.

As for the downstream migrants the louver barriers proposed by WPPSS are particularly suspect. These are based on the theory that a fingerling fish will follow along the louver in preference to passing with the water between the louver bars. This depends on the behavior of the fish and a lack of water turbulence in the approaches to the louver barriers. WPPSS has presented evidence and contends that its louver barrier at Whitebird will not be rendered ineffective by water turbulence and trash, including floating logs, because of the log barrier to be employed and methods for cleaning the trash racks. Nevertheless the record leaves us in considerable doubt whether the louver device will operate successfully on the Salmon where the current will be swifter and the depth greater than at previous installations. The method of collecting the fish in pipes, a secondary louver and tanks also raises grave questions as to whether the inevitable changes in the quality of the water surrounding the fingerlings will not disturb their instinct for returning to their natal headwaters to spawn.

The record shows, that the most important hazard to upstream migrants or downstream migrants passing the louvers is the reservior created by the dam. As may be recalled the HMS reservoir would extend 58 miles up

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the Snake River while the Nez Perce reservior would extend in two branches, one 61 miles up the Snake River and one 63 miles up to the Whitebird fish barrier on the Salmon River. The difficulty arises because the chinook are basically river fish and do not appear to adapt to the different conditions presented by a reservoir.

A reservoir exhibits a peculiar thermal structure. During the winter it is homogeneous with regard to temperature, but as the season advances a horizontal stratification results with the colder water sinking lower. Since Salmon River water is colder than Snake River water, it is possible, if not probable, that in the Nez Perce reservior the water from the two rivers would be found in separate layers and by drawn off at different times. Presumably the upstream migrants reaching fish ladders might at one time be presented with water from one river and at another time water from the other river. If water quality is important in attracting the upstream migrants to their proper streams, as many experts believe, this stratification would be a source of confusion and delay. Also a source of confusion to the upstream migrants would be the predicted tendency shown by the record for water from the Salmon River arm of the Nez Perce reservior to flow up the Snake River arm and vice versa. Again the fish are faced with a complicated problem in finding their way.

The velocity of flow in the Nez Perce or HMS reservoir would be very low compared with the free flowing stream or even compared to the flow in the reservoir of the McNary dam on the Columbia. Since the upstream migrants follow

water flow and downstream migrants are carried by current, such low velocities offer a further obstacle to the passage of anadromous fish.

The record also shows that during the summer months the oxygen content of the water in the reservoir at the lower levels will fall to amounts which are dangerously insufficient for salmon. The decrease in oxygen content appears to be due to decomposed sinking dead organisms (plankton) from the upper layers of water. The record indicates that salmon require an oxygen content of approximately five parts per million, yet the oxygen content at the 250-350 foot level would fall in August to less than three parts per million.

Another phenomenon of importance is "residualism," a term used to describe the failure of anadromous fish to pass through the reservoir to the ocean. If loss of water velocity or accumulation of dissolved salts can cause the downstream migrants to remain in the reservoir, they are lost as perpetuators of the species, since residual fish do not spawn successfully.

WPPSS tries to rebut the evidence with respect to reservoirs. It cites testimony to the effect that it is not known how a salmon finds its way back to its home stream, that Salmon River water will not appear in the Snake River arm of the reservoir and that the salmon will be able to follow the cool lower strata of water to the upper end of the reservoir.

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As to the oxygen content issue, which would of course affect this cool lower water, WPPSS argues that the fishery witnesses' testimony did not take into account that the Salmon River contains pure, soft water which would not be conducive to high plankton production, the most im-

portant factor in oxygen consumption, and has exaggerated the time that water is retained in the reservoir.

These are matters which, in the present state of the knowledge of fish habits are highly controversial, and are not in our opinion clearly resolved in the record. There is abundant evidence, however, that a reservoir, such as the one that would be formed by the Nez Perce dam (or HMS) would provide many risks to the upstream migrants. Alternative methods of handling the problem suggested by WPPSS do not obviate these severe risks. Thus transporting adult fish in tanks involves the danger of injury and disease. Establishment of hatcheries would not necessarily be effective. While the propagation of fall chinook in hatcheries has been successful, the same is not true of spring and summer chinook although WPPSS argues that it could be done.

As a result of our consideration of the evidence raised in this copious record we agree with the contentions made by the fishery interveners and the staff that high dams and reservoirs present major obstracles to anadromous fish. In the present state of the art it is not possible to build facilities for fish passage with any assurance that they will be effective. The Nez Perce project affects both the Snake and Salmon Rivers and would endanger the fish runs on the Salmon; the HMS project affects only the Snake River where the fish runs are already impaired.

The Snake River fish runs are already subject to the constructed Brownlee and Oxbow developments and the Hells Canyon development, now under construction, of the Idaho Power Company (Project No. 1971, 14 FPC 55). In this connection we take notice that the Idaho Power Company seeks to abandon as ineffective the facilities for downstream migrants required by us at the Brownlee Project (see our order in Project No. 1971 of March 22, 1963).

While the eventual effect of the present Snake River projects on the fish runs is not shown in the present record, another project on the Snake would obviously not constitute the threat to the Columbia River fish runs in any way comparable to a project on the untouched Salmon River. This appears to be also the view of the Corps of Engineers expressed in a report to the Secretary of the Army dated March 31, 1961, where it was stated that "at least 15 to 20 years might be necessary to resolve the problem that would be created by the Nez Perce project" while "The High Mountain Sheep project could be constructed now without being a serious hazard to the anadromous fishery." Likewise the Secretary of the Interior, whose department is largely responsible for the preservation of wild life, stated in a letter of June 28, 1962, that a "calculated risk" at Nez Perce "would not be warranted" but that "The Mountain Sheep project represents less hazard to the fishery resource than the Nez Perce project."

We are well aware, that in reaching this conclusion we are departing from the optimism as to the efficacy of fish passage facilities on high dams which was reflected in the decision approving the application of the Idaho Power Company for its three developments on the Snake River (Project No. 1971)[16] as well as in the original decision on PNPC's application for the Mountain Sheep and Pleasant Valley projects. We can only state that nothing in this record made in the light of subsequent knowledge or which has come to our attention in the course of our day-to-day dealing with the problem in the past two years would justify continuing such optimism. We can hope for the best and we will continue to insist that any licensee building a high dam at a site which presumably involves major

[16] 14 FPC 55.

fish runs do everything possible within the limits of reasonable expense to preserve the fish runs. But as of now we understandably must assume that the best efforts will be only partly successful and that real damage may and probably will be done to any such fish runs.

WPPSS alleges it was denied due process as a result of the examiner's handling of the fish issue at the hearing. It complains that the rights of the parties were subordinated to considerations of speed and counsel was cut short in efforts to cross-examine the witness for the Idaho Commission. WPPSS also argues that PNPC was given first chance to cross-examine although PNPC's cross-examination was friendly rather than hostile, so that the witness was able to expand his testimony. When counsel for WPPSS attempted cross-examination, it says, objections were sustained on the ground that the subject matter had already been covered. We are of the opinion the WPPSS's allegations are not sustained by the record and that, in any case, the rulings made by the examiner were not prejudicial.

Although counsel for PNPC was allowed to cross examine the witness for the Idaho Commission first and may have enabled the witness to amplify his testimony, this does not constitute error even if it could be argued that it lengthened the record unnecessarily. Counsel for WPPSS was permitted lengthy cross-examination of this witness; his examination covered some 150 pages in the transcript. WPPSS has set forth thirty-eight instances in which it alleges that the right to cross examine was improperly denied by the examiner. Upon consideration of the questions asked we think that the examiner was not in error in sustaining objections to the questions. In each instance it could reasonably be said that the questions were defective—irrelevant, argumentative, repetitious, or

outside the competency of the witness—and we do not think the examiner erred. In several instances counsel for WPPSS secured an answer by a differently phrased question.

Even assuming that some few of the examiner's rulings may have been legally erroneous they are not, we believe, prejudicial. The questions concerned a wide variety of subjects such as possible bias of the witness, fish counts and allocation of fish among river tributaries, angling activity, computation of numbers of downstream migrants on the basis of eggs layed, differences between the Brownlee dam and the proposed Nez Perce dam, comparison of the louver device at Whitebird with one on another river, the effect of water pressure on spawning, and the necessary size of fish ladders. These subjects are for the most part relevant, but none of the questions or their possible answers would cast doubts on the essential basis of our decision here that there are undeniably large numbers of salmon that make use of the Salmon River, that a high dam and reservoir represents a major danger to the fish runs despite WPPSS's best efforts to surmount the problem, and that the Salmon River runs will not be damaged by a dam at HMS.

In order to assure a sufficient flow of water to maintain fish life below the HMS dam the Idaho and Oregon Commissions have recommended amendment of the examiner's ordering paragraphs relating to flood control and navigation. While sympathetic with these Commissions' objectives, the record fails to justify adoption of this recommendation. The two commissions have also asked that conditions be inserted in the license providing for the replacement of fish and wildlife habitat affected by the license. We think this is too broad a requirement and will use the

paragraphs relating to fish and wildlife which we are now employing in other licenses. These appear as Articles 16 and 53 in the conditions.

D. Conclusion on the River Projects and Plans of Development.

As between the proposed HMS and Nez Perce projects we find that HMS itself is a smaller project with a lesser ability to generate power and a significantly lesser ability to store flood waters (a matter of importance only until the advent of Canadian storage). However, as a plan of river development the HMS plan, although somewhat more costly and possibly producing power at a higher unit cost, produces more benefits than the plan involving Nez Perce. While the estimates are contradictory, it does not appear that the net benefits of either plan are very much greater than the other. The HMS plan, however, has one decisive advantage over the Nez Perce plan. It permits postponement of a dam on the Salmon River until the fish passage problem is more clearly solved. On this basis we believe the HMS site rather than the Nez Perce site should be developed.

WPPSS argues that permitting the fishery issues to be a dominant consideration was inconsistent with past Commission actions. It is true that we have approved projects where some damage to fish appeared likely (see *City of Tacoma*, 10 FPC 424) in order to avoid denying the project. But this does not and cannot mean that the fishery resource must inevitably yield to power considerations. A balancing of equities, in the light of the relative importance of the two claims on our natural resources in the

particular case must be determinative. Here the fishery resource is a major one. Insofar as a further dam on the

Snake is concerned, we believe that the power factors outweigh the possible loss, even assuming that the best efforts at HMS will further diminish the already impaired fish runs there.

Proposed Developers of the Projects

Having narrowed the problem to the proposed HMS project and plan of development, we have before us PNPC's application for a license for this project, WPPSS's amendment of its Nez Perce application to include HMS, and the request of the Secretary of the Interior not to grant any license but to recommend Federal development. We do not think differences in construction features or differences in cost as between the two applicants for the HMS project are decisive because the plans are not final and can be modified and undesirable features eliminated.

As between the applicants, the initial question is a legal one, i.e., whether PNPC has a priority under its preliminary permit. If so, as we believe is the case here, the license should be issued to PNPC provided that it conforms to the requirements of the Act in other respects. For instance, in order that its project, HMS, be "best adapted" within the meaning of Section 10(a), there should be a sufficient market for its power. If PNPC has a priority under its preliminary permit, it will not be necessary to consider whether WPPSS would otherwise have a preference under Section 7(a), for that Section only applies "where no preliminary permit has been issued". Further, it is not necessary to resolve other questions relating to WPPSS such as its legal capacity to undertake a project outside of its own state.

Finally, we have before us the issues raised by the Secretary of the Interior in his request that federal construction be recommended. The most important of these

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issues is whether a non-feredal licensee can effectively coordinate the operation of a Snake River project with the federal projects downstream and whether a probable delay as a result of federal construction would prevent the region and PNPC from obtaining needed power resources.

A. PNPC's Priority Under its Preliminary Permit

This legal question is twofold: did the preliminary permit granted PNPC on April 8, 1955 expire before its stated term of three years in the absence of any order terminating the permit; and was the permit limited to the site described in the application for a preliminary permit or did the permit extend to that project which was best adapted to a comprehensive development of that reach of the river?

A preliminary permit is issued under Section 4(f)[17] of the Act to enable an applicant for a license to make studies and gather data and at

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the same time under Section 5[18] to maintain its priority of application. Section 4(f) specifically states that the permits are to enable applicants to secure the data and perform the acts required by Section 9. The latter requires

[17] *Sec. 4.* The Commission is hereby authorized and empowered—(f) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by Section 9 hereof: . . . .

[18] *Sec. 5.* Each preliminary permit issued under this Part shall be for the sole purpose of maintaining priority of application for a license under the terms of this Act for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority may be maintained. Such permits shall not be transferable, and may be cancelled by order of the Commission upon failure of permittees to comply with the conditions hereof or for other good cause shown after notice and opportunity for hearing.

that each applicant submit to the Commission "maps, plans, specifications and estimates of cost as may be required for a full understanding of the proposed project." Section 5 refers to the permit as being for the sole purpose of maintaining priority for a period, not exceeding three years, for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements.[22] The statute limits the purpose of the permit to priority to avoid any interpretation that it represents permission to begin construction. The statute does not prevent but clearly contemplates that proposals and plans made at the time the permit was issued may be changed as a result of investigations made by the permittee. At the same time the permittee is protected by the permit from rival applicants while incurring expenses in the investigation of a project intended and required by Section 10(a),[19] to be best adapted to a comprehensive development of the reach of the river involved.

We consider it evident that the statutory intent of these provisions is to give a permittee the first right to develop that reach of a river to which the permit relates. Any other interpretation would make the permit meaningless, for if another party could obtain a permit or apply for a license for a nearby project that would develop substantially the same head as the one described in the original permit, there would be no protection to the first permittee. Likewise, if another project affecting essentially

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[19] Sec. 10(a). That the project adopted, including the maps, plans and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

the same reach of the river were not considered within the original permit, the original permittee could apply for a separate three-year permit for such project and could thus tie up the development of the river for a period of time substantially in excess of that contemplated in the statute. Thus, to construe these statutory priority provisions narrowly would be, in effect, to write them out of the Act.

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To interpret the priority afforded by a permit as limited to a single project would also be contrary to the two most significant objectives of the Act, namely, to encourage the development of our nation's water resources, and to insure that such development would be best adapted to the fullest use of the river, considering all uses. Who would be willing to undertake substantial and expensive investigations looking toward development of a river if a permit were good only in the event—the unlikely event—that the results of the investigations coincided precisely with the permittee's guesstimate at the time the permit application was filed? In this connection, it is the experience of the Commission that a project is rarely constructed at the same exact site and in the same fashion as originally contemplated. Indeed, we are unaware of a single instance where this is true. For example, in the *Alabama Power* case[20] the permit listed specifically five developments on the Coosa River in Alabama. The license also provided for five developments covering approximately the same reaches of the Coosa River but with three of them in different locations.[21] In the *Grant County* case[22] the permit de-

[20] *Alabama Power Co.*, 13 FPC 1235, 18 FPC 265.

[21] The permit described projects at river miles 13.5, 67.5, 105.7, 148.5 and 227.0, while the license described projects which are located at river miles 12, 51, 98, 147, and 227.0.

[22] *Public Utility District No. 2 of Grant County*, 13 FPC 1462, 14 FPC 1067.

scribed one dam, Priest Rapids, at river mile 397 on the Columbia River, but the license described two dams for the same reach of the river, Priest Rapids at river mile 397 and Wanapum at river mile 415.

If priority extended only to that project described in a permit, the pressure would be great upon the permittee not to explore fully alternative projects which might be superior. Clearly, if such investigations were conducted and an alternative development were considered preferable, the first permittee would be in danger of losing its opportunity to develop needed generating capacity as a result of its own actions. Thus, a narrow interpretation of the priority provisions would serve to undermine the objectives of Section 10(a) of the Act which is designed to insure the optimum development of our water resources. As a unanimous Commission recently held:[28]

> It [preliminary permit] is granted in a situation where the feasibility of a project in a particular stretch of a river has not as yet been demonstrated. It gives the permittee a priority over other non-Federal parties in order to encourage the investigations of projects which otherwise might never be investigated or built.

In view of the incongruity of a narrow interpretation of the priority afforded by a permit with the fundamental objectives of the Act, as well as the specific provisions on priority itself, it would require a compelling showing to convince us that PNPC's preliminary permit is of no effect respecting PNPC's HMS license application. To the contrary, we view the

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[28] *Georgia Power Company*, Project No. 2303, "Order Denying Application for Preliminary Permit", issued April 2, 1962.

numerous terms of PNPC's permit as describing that type of permit contemplated by the Act.

There are six specific articles in the permit which required PNPC to cooperate with various federal, state and other interested agencies for the purpose of evolving the best development of the Snake, irrespective of the detailed description of the project as tentatively proposed. Article 10 required PNPC to cooperate with the U.S. Forest Service to develop a plan for alleviating damage to and achieving maximum utilization of National Forest resources. In Articles 11 and 12, the permittee was obliged to negotiate and cooperate with the U.S. Fish and Wildlife Service and various commissions of the states of Idaho and Oregon in formulating measures in the interest of fish and wildlife conservation. Article 13 required PNPC to cooperate with enumerated State departments and commissions and with the U.S. Forest Service regarding the recreational phases of the project. PNPC was required by Article 14 to cooperate with the Bureau of Mines concerning mineral resource possibilities. Most importantly, Article 15 required PNPC to cooperate with the Corps of Engineers and the Bureau of Reclamation "... with the object of determining a plan of development for the two sites best adapted to a comprehensive plan of development of the water resources of the Snake River." To adopt a narrow interpretation of the permit would be anamolous in that PNPC would be required to develop the best plan of development when it would thereby lose its priority to carry out the development.

WPPSS emphasizes that language in paragraph (A) of PNPC's permit, i.e., "This preliminary permit is issued ... for the sole purpose of maintaining priority of application for a license for Project No. 2173 ...". However, the

specificity in applications for permits required by our regulations arose from the necessity of limiting unnecessary reservations of land for power purposes to the detriment of the public. The legislative history of the Water Power Act evidences a grave concern with undue reservations of public lands for such purposes.[24] It was for this reason that our regulations were designed to provide a detailed description of

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the lands occupied by the project. While it is not possible to achieve these desired results in every case, as here, we do not view those situations as adequate justification for abandoning our attempts to insure a sensible program of land withdrawals. Thus, as stated above, our regulations governing the filing of applications for preliminary permits require the specification and the location not only of the lands to be used but also of the major project works. Any application for a permit failing to contain the required specificity would be rejected under our Rules. Section 4.81 of our regulations under the Federal Power Act which specifically deals with the filing of applications for preliminary permits, as well as Section 1.14(a) of our Rules of Practice and Procedure, specifically provide for such rejection.

While the detailed description of site in both the application and in the resulting permit enables a sensible program of land withdrawals, we do not believe that this aspect

[24] Hearings, House Committee on Public Lands, 63rd Cong., 2d Sess. on H.R. 14893, May 5, 1914, p. 195, 357-359; Cong. Rec. July 20, 1914, vol. 51, pp. 14061-14062, debate on H.R. 16673. Hearings, Senate Committee on Public Lands, 63rd Cong., 3rd Sess. on H.R. 16673, Dec. 17, 1914, pp. 351-355; H.R. No. 16, 64th Cong., 1st Sess. 1916, Report of Committee on Public Lands to Accompany H.R. 408; Cong. Rec. Jan. 5, 1916, vol. 53, p. 527, debate on H.R. 408; Hearings, House Committee on Water Power, 65th Cong., 2d Sess. May 13, 1918, p. 623-624; Cong. Rec. Sept. 5, 1918, vol. 56, p. 10035, debate on S. 1419; Cong. Rec. July 1, 1919, vol. 58, pp. 2243, debate on H.R. 3184.

should be or is controlling with respect to the scope of a permit.[25]

Moreover, we view the language in paragraph (A) of the Commission's order above cited as emphasizing the fact that no construction authority was being granted, but only a priority to conduct investigations. In several early proceedings, various parties appeared in opposition to preliminary permits when the opposition related to the project itself, and not to the priority aspects of a project.[26] In these cases, the Commission emphasized that only a priority was involved and that the merits of the project ultimately sought was the subject matter of license application.

The scope of a preliminary permit containing language identical to that in PNPC's permit was specifically considered in the *Montana* case.[27] Montana was the permittee for proposed Project No. 2164 (at mile 36.4) and 2163 (at

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[25] After carefully selecting and citing the general requirements of the regulations, the minority assert that it can find no unyielding requirements of specificity. If the minority had gone further and considered Exhibits E, F, H and I prescribed by Section 4.82(k), the specificity we referred to would have been discovered. Exhibit H, for example, requires:

> "*Exhibit H.* A general map showing the nature of *the proposed project, its principal features and their location, and the location of the project as a whole with reference to some well-known town or stream.* On this map shall be placed a line indicating the approximate project boundary of the area to be occupied by the principal project works, such as, dams, reservoirs, forebays, waterways, and powerhouses, but excluding transmission lines, and *where necessary in order to determine the location of such structures on the ground, there shall be shown on the map their relative positions with respect to permanent monuments or objects that can be readily recognized from descriptions thereof noted on the map.* (See specifications for drawings, § 4.42.)" (emphasis added)

[26] *E.g., Linoma Power Co.*, 8 FPC 999 (1949).

[27] *The Montana Power Co.*, 17 FPC 834. Actually this language is found in virtually every preliminary-permit granted by the Commission. In fact, we are not aware of any permit containing broader language.

mile 60.7) on the Flathead River. Previously, Montana had

been issued a permit for Project No. 2135 at mile 68.6. Project No. 2163, if constructed would have inundated Project No. 2135. Subsequently, Montana filed for a fourth permit, identified as Project No. 2223. If constructed, this project would develop the same reach of the river as Projects Nos. 2163 and 2164. On January 8, 1957, the Confederated Salish and Kootenai Tribes filed an appearance in opposition to Montana's application for a permit for Project 2223. They characterized that application as an attempt to secure an unlawful priority to apply for a license.[28] The Secretary of the Commission had previously requested additional support for the grant of the permit since it appeared that Montana's existing permits enabled it to conduct the necessary studies regarding Project 2223. In response, Montana agreed that the same reach of the river was involved in its existing permits as was covered by Project 2223. Nevertheless, it pointed out that proposed Project 2223 was substantially different from the projects contemplated under permits 2135, 2163 and 2164 and went on to describe some of these major differences. Nevertheless, the Commission denied the application for a permit for Project 2223 as unnecessary. That order carefully explains that the amendment was denied because the examinations, surveys and other acts, the performance of which is contemplated under a preliminary permit could be made with respect to Project 2223 under the outstanding preliminary permits for Projects 2163 and 2164. The Commission made this finding notwithstanding the different identification numbers assigned to the two proposals. The

[28] Subsequently, these tribes filed an application for a preliminary permit for Project No. 2285 which involves the same reach of the Flathead River.

holding in this contested proceeding cannot be reconciled with the minority's position.[29]

Both Staff and WPPSS argue, in effect, that the priority granted by a permit, irrespective of the scope thereof ceases to have independent efficacy upon the filing of a license application. We disagree. Section 5 provides for priority "for such period or periods, not exceeding a total of three years . . .". It does not state that a permit expires when a license application is filed nor does it state that a permit somehow "merges" into a license application. Moreover, Article 3 of PNPC's permit specifies certain conditions under which the priority granted by the permit will be lost. None of these conditions is present in this case. Staff and WPPSS place substantial weight upon an opinion of the FPC General Counsel given in 1923. This obscure opinion is not mentioned in any Commission determination of which we are aware. Moreover, the basic issue discussed in that opinion is whether priority extends beyond the term specified in a permit in situations where a permittee filed a license application within the duration of the permit. On this point, there is no dispute. But that is quite a different question from the one involved here, i.e., whether a permit terminates upon the filing of license application. As the minority correctly recognize in one place, the instant case represents the benchmark decision on the latter issue.

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[29] The minority allege the requested amendment in that case specified a project "at precisely the same site the applicant was already exploring under an existing permit for a smaller dam." A careful review of the *Montana* record does not support this allegation. But even if it were true, the scope of a project and its effect on adjacent lands, waters and other potential projects are affected not only by the site of a project but also by several other features, such as its height. The minority further point to the *Appalachian* case (17 FPC 8, 19 FPC 169) in which an amendment was allowed. That case involved a request for a completely new project—14 miles away—in addition to that already the subject of a permit.

PNPC's original license application for a two-dam Mountain Sheep Pleasant Valley development places the dams at a slightly different location than the permit described. And PNPC actually made investigations under the permit of no fewer than three different one-dam High Mountain Sheep developments.[30] This was consistent with the Resolution of PNPC's Board of Directors, embodied in its application for a permit, which authorized its officers

> "to apply . . . for a Preliminary Permit . . . to make studies, surveys, and investigations of the feasibility of hydroelectric power developments *in the vicinity of the* Mountain Sheep and Pleasant Valley Hydroelectric sites on the Snake River, in the States of Idaho and Oregon, for the purpose of enabling the company to secure the data and perform the acts required by law for filing an Application *or Applications* for the issuance of a license or licenses;" (emphasis supplied; Exhibit B, application for preliminary permit)

After the Mountain Sheep-Pleasant Valley application was denied, PNPC was fully aware of the fact that the term of its permit soon would expire. In its application for rehearing of the Commission's Opinion and Order denying the license, PNPC requested the Commission to protect its priority in addition to its argument for the licensing of Mountain Sheep-Pleasant Valley. It asked that the matter be set down for rehearing to consider such modification of its project as would represent the most comprehensive development of the resources. Article 3 of its permit specifically provided for the Commission's modification of the plans submitted by the permittee as, in the judgment of the Commission, would be best adapted to a comprehen-

[30] Tr. 1474-5, Project No. 2173.

site plan of development. PNPC pointed out particularly that an HMS dam between the Salmon and Imnaha had not been considered by the Commission. Nevertheless, on March 20, 1958 (19 FPC 353) the Commission issued an order denying rehearing stating that an opinion would be issued later.

PNPC was faced with a serious problem. It's three year permit would expire April 1, 1958. It might have obtained an amended permit specifying Nez Perce, but this was most doubtful in view of the *Montana* case, *supra*. More importantly, PNPC adhered to its position that any project which blocked the fish runs on the Salmon was not the best development. While its application for rehearing was denied, there was no opinion and PNPC could not know whether its priority would be preserved by Commission action under Article 3 of its permit. In the meantime, additional studies indicated the probable geological feasibility of the HMS site,

and PNPC filed a license application for a project for this site, a site 3.4 miles below the initially proposed Mountain Sheep development.[31] Subsequent to the filing of this license application, the Commission released its opinion on rehearing declaring its view that any combination of projects which includes Nez Perce is consistently superior to any combination which does not include Nez Perce. In-

[31] In a footnote, WPPSS makes the argument in cursory fashion that PNPC's HMS license application was incomplete when it was initially filed, and was not completed until after the term of the preliminary permit had expired. Section 4.81 of our regulations and 1.14(a) of our Rules of Practice referred to above provide for rejection of applications tendered to the Commission which do not contain the requisite information. PNPC's HMS license application was not rejected but was accepted for filing by the Commission. The fact that additional data was requested here, as in most cases, and submitted does not change our view regarding the adequacy of the filing or the correctness of its acceptance. WPPSS's contention is untimely and unmeritorious.

terestingly, the Commission did not make the requested finding that a Nez Perce project represented the most comprehensive development of the Snake, considering all uses. Thus, while the dream of Nez Perce was considered adequate justification for a denial of an alternative development, it is anamolous that the Commission apparently lacked the necessary conviction to make or direct appropriate modification of PNPC's plans under Article 3 of the permit to specify Nez Perce.

As a matter of fact, PNPC is to be commended for sticking with its concept regarding the proper development of the Snake. With the issuance of the Commission's opinion on January 20, 1958, indicating its conclusion that Nez Perce represented the best development of this reach of the Snake, it would have been an easy matter for PNPC to have promptly filed a license application specifying this site. This it did not do. Rather, it insisted that any proposal which would block the Salmon River was not best adapted to comprehensive development. While equitable considerations are not relevant in determining the scope of a preliminary permit, we are nevertheless constrained to observe the irony involved in rejecting PNPC's proposal to develop the Snake when its HMS application would promptly have been granted had the Commission properly analyzed the relative merits of a Nez Perce project.

Our dissenting colleagues also recognize the need for flexibility and attempt to avoid any interpretation of a permit which would impose the "impossible demands" of requiring parties to guess in advance of exploratory studies conducted under a permit. The minority's solution, i.e., filing of amendments to permits, is incomplete because the all important question remains: Does a party having a permit have a right to an amendment to the permit for a project concerning the same stretch of the river? The

minority carefully fails to answer this critical point. If they answer negatively, their solution is frustrating and fatuous since it would encourage parties to perform useless activities. If they answer affirmatively, they are simply imposing additional filing requirements of no substance since, in effect, a party obtains priority to a given stretch of the river under the original permit.

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The dilemma of the minority may be attributable, at least in part, to its misunderstandings on two important points. First, our decision will not result in tying up our nation's waterways for extensive periods to the exclusion of applicants accorded preference by Congress. Private parties do not have exclusive rights to permits. Preference parties not only have an equal chance to obtain a permit but, in addition, have a preference for a permit guaranteed by Section 7(a). A second major misconception is that our decision would somehow fail to give adequate notice to preference parties of the developments contemplated under a permit. Once a party, preference or otherwise, has a permit describing a project which would develop a specific stretch of river, everyone is on notice that the permittee has priority to construct at least the project described in the permit. Quite clearly, this would foreclose *any* development on that stretch of the river contemplated by any other party. It is therefore inconsequential, as far as notice is concerned, if the construction plans are altered as long as the same reach of the river is involved.

We therefore conclude that PNPC is entitled to priority for its application to develop the HMS site. Accordingly, the preference provisions of Section 7(a) are not applicable with respect to WPPSS. Section 7(a) states that, as a matter of law, preference rights to state and municipal bodies apply only in those situations where no preliminary

permit has been granted, regardless of our individual predilections. Even the minority ultimately reveals its concurrence with this limitation, although this concession is nearly lost in its extended discussion of the legislative history of preference, a discussion, incidentally, with which we agree.

In the event our decision on priority is adjudged to be erroneous, it would be necessary, under Section 7(a), to give WPPSS a reasonable opportunity to make its plans equally well adapted to those of PNPC and to evaluate such plans following a hearing thereon. An important element to be developed at the hearing would be WPPSS's need for HMS power. As stated below, the present record is sorely deficient respecting the existing generating capacity of the entities comprising WPPSS. This information would be essential in any determination of the entitlements of WPPSS to a preference under Section 7(a).

This as well as additional data would also be required regarding the financial feasibility of the WPPSS proposal. As pointed out below, we would not grant a license to WPPSS in the absence of far better showing of its ability to finance HMS construction.

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Following the hearing on this issue, we would then determine if preference properly accrues to WPPSS, and the effect of such a preference, if any, in the light of all the other factors relevant to a disposition of these applications. We cannot make such a determination at this time, nor is there any reason so to do in view of our finding that PNPC has priority. For the same reason, it is unnecessary to resolve the serious question respecting the legal status of WPPSS outside the State of Washington. Section 9(b) of the Federal Power Act expressly requires from license applicants:

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

Idaho has a statute governing this situation. Section 61-327 of the Idaho Code states:

> "No title to or interest in any property located in this State which is used in the generation, transmission, distribution or supply of electric power and energy to the public or any portion thereof, shall be transferred or transferrable to or acquired by directly or indirectly by any means or device whatsoever, any government or municipal corporation, quasi-municipal corporation or governmental or political unit, subdivision or corporation organized or existing under the laws of any other state; . . .".

Both the Idaho and Oregon Utility Commissions object to the licensing of WPPSS on the basis of WPPSS's failure to comply with state laws. Moreover, a U.S. District Court has found that WPPSS lacks authority from its own state of Washington to develop hydroelectric projects outside the State.[32]

Without deciding this issue, nevertheless the very existence of these acts, however controversial, belies the minority's easy assurance that WPPSS is so qualified. The *First Iowa* case which they cite expressly recognizes

[32] *WPPSS* v. *PNPC*, 217 F. Supp. 481 (1963).

a dual system of control by the states and the federal authority:

> "In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, *the Act establishes* a *dual* system of control. The duality of control consists merely of the division of the common enterprise between two co-operating agencies of the Government, each with *final* authority in its own jurisdiction." (328 U.S. 152, 167, emphasis added)

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B. Power Resources and Requirements.

Evidence was presented by PNPC, WPPSS, and staff on the load requirements of the Pacific Northwest and on resources to meet these requirements by both PNPC and WPPSS. The figures submitted by the parties differ somewhat because, among other things, PNPC used a different area and did not include old steam capacity in the resources. Staff used lower load growth figures since population and industrial growth did not measure up to earlier estimates. The figures are extensive and based on estimates as to future loads and resources. They take into account proposed projects such as Monumental, Boundary and Libby, and also the effect of storage under the proposed treaty with Canada, ratification of which was assumed in 1961. The figures, however, do not take into account demand and additional resources that may be available from the proposed inter-tie with California. The effect of the evidence, assuming a further three-year deferral of the Canadian treaty ratification, is to show a

substantial deficiency in both capacity and in average energy during the critical storage control period (usually the winter months) at least by 1970-71 in an amount that is substantially greater than the power that would be available from the HMS project.

The Secretary of the Interior argues that the future power deficiency will be removed by the construction of additional projects on the Snake and Columbia and by the Hanford nuclear project. In fact, he says, that by 1967-1968 the area will be faced with substantial surplus resources. PNCP itself admits that since the record was closed nine projects have been scheduled in addition to those included in PNPC's evidence. It is natural, of course, that as time passes other projects will be authorized by Congress and scheduled. Otherwise, large deficiencies would develop that would have to be met by more expensive steam generation. We will take notice that such projects are scheduled, including the Hanford atomic reactor, but it appears that at least part of the capacity of HMS could be used on a regional basis by the year 1970-1971 assuming ratification of the Canadian treaty this year. The record shows that Canadian storage postpones the regional need for power a year or so. Because of the need of further investigation of the site, preparation of final plans and construction, the HMS project will not be in service in any case until around 1970.

Of more significance in our opinion than the regional power situation are the load and resources of the PNPC companies themselves. The evidence shows, taking into account deferral of the Canadian storage, that the PNPC companies can use the power from the HMS project as soon as 1964-65, and that by 1970-71 the deficiency would be substantially greater than the power that would be available from the HMS project.

We are aware that the four companies have acquired further resources since the preparation of the figures; namely, a share in the Hanford and Wells projects. This is material outside of the record, but it would not appear that these additional resources would meet the load deficiencies in 1967-1968 and later, even with HMS.

The Secretary and WPPSS argue that PNPC can obtain its requirements elsewhere; that is, from the Northwest Power Pool, including BPA. The Secretary says that the possibility is extremely remote that he will "pull back" power now sold to private companies. This action could be taken pursuant to the Bonneville Act,[33] which provides that the administration shall "give preference and priority to public bodies and cooperatives" (Section 4(a)) and that "in the case of a contract with any purchaser engaged in the business of selling electric energy to the public, the contract shall provide that the administrator may cancel such contract upon 5-years notice in writing if in the judgment of the administrator any part of the electric energy purchased under such contract is likely to be needed to satisfy the requirements of the said public bodies or cooperatives referred to in this Act" (Section 5(a)). Actually, under letter of August 10, 1960, the Secretary exercised the "pull-back" provision in providing for a declining schedule of deliveries (none in 1966-1967 and none after 1970). In view of these statutory provisions, it is our opinion that PNPC is not able to rely on any power supply that BPA may have available, and the company can reasonably claim a need for its own supply. In fact, we think it owes a duty to its customers to obtain power that is not subject to this statutory disability.

[33] 16 USC § 407.

In contrast to PNPC we find that WPPSS and its members and the public power agencies that would participate in Nez Perce do not have the same need for generating capacity as PNPC. According to the record, WPPSS's loads will be met by the generating resources of its own members, and by BPA until 1970. While WPPSS argues that it has no assurance that BPA will be able to supply power to it after 1970, and that in any case the price will go up, WPPSS has a preference for BPA power while PNPC does not. Thus WPPSS is in a far better position to include BPA power as a resource in its planning than is PNPC. WPPSS has failed to show on the record the amount of power resources owned by its members and participating agencies, but we take notice that they are considerable and that WPPSS has failed to take them into account in making its presentation of a need for power. The sketchy evidence in the record on this point shows that the WPPSS member organizations operate generating plants and will operate a plant on the main stem of the Columbia, and that the Cowlitz County PUD operates a steam plant and the Grays Harbor PUD another steam plant. In fact, by the year 1970-71 WPPSS would have available assured resources including power from BPA now available and that withdrawable from others in the amount of 1,907 mw or 144 percent of the estimated load.

To add the resources of HMS to those of WPPSS would be adding a surplus to the resources available to WPPSS. The record shows that WPPSS and its members contemplate disposing of this surplus power to other public agencies, then to industries and private utility companies under contractual provisions that permit the drawback of the power when it is needed by the WPPSS participants. It is relying for the disposition of its power on 46 public agencies which in reply to a letter from WPPSS had signed

commitments for the power. While we would not require firm contracts for the power these commitments were on the express condition that the power to be purchased would be at a cost which would make it attractive compared to other long-range alternatives and on mutually satisfactory terms. Whether or not WPPSS and its participants prefer to take HMS power and let the BPA power go to the private utilities, or prefer to hold on to the BPA power and sell the HMS power does not change the result. WPPSS has available power, not set forth in the record, and also BPA power for which it has a preference, while the PNPC companies do not have any preference for BPA power and can use the entire output of HMS as soon as it can be expected to come into operation. The record indicates that a project will not be needed to meet the loads of public agencies in the Pacific Northwest, including those of WPPSS, until some indefinite time after 1970. This is consistent with the statement of the Secretary of the Interior that BPA is suffering a reduction in revenues because of a lack of market for its power.

In summary as to the need for power, we conclude that the PNPC sponsoring companies will be able to use HMS power as soon as it is available. On the other hand WPPSS has failed to demonstrate any need for such power now or in the foreseeable future. We emphasize, however, that if it were not for our determination that PNPC has priority under the permit we would give WPPSS further opportunity to show its need for power and its ability to finance, so that it might show that its project was "equally well adapted" within the meaning of Section 7(a).

On financing, briefly PNPC would raise the necessary funds by selling equity for 15 percent of the capitalization to the organizing companies and floating a public bond issue for the remaining 85 percent of the capitalization. While the high debt ratio has been questioned, a higher

ratio has been employed for other power generating projects.[34] The combined capital ratio of PNPC and its sponsor companies using their

capitalization as of December 31, 1960, would be 65.48 percent for long-term debt, 4.35 percent for preferred stock, 26.86 percent for common equity, and 3.31 percent for deferred Federal income taxes. The record supports the saleability of PNPC's bonds, and no question has been raised as to the ability of the sponsor companies to finance their participation in the proposed project. We agree, however, with the recommendation of the staff that any PNPC license be conditioned so as to require submission of a complete plan of financing prior to the beginning of construction. WPPSS on its part would finance its project through bonds.

C. Restraint of Trade

WPPSS argues that PNPC is a combination in restraint of trade citing Section 10(h) of the Power Act which provides as follows:

> That combinations, agreements, arrangements or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

WPPSS argues that PNPC is a combination of utilities to monopolize for themselves the largest remaining power site on the Snake River, and to deprive all other competing public utilities of access to the power, and this would lead to control over the entire economy of the Pacific Northwest.

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[34] *Ohio Valley Electric Corporation, et al.*, 36 S.E.C. 304; see *South Carolina Generating Co.*, 16 FPC 52, 61.

It also says that the four PNPC companies will fix prices for power, on the theory that they are guaranteed a 6 percent dividend on their capital contributions, and this will put a floor under the prices of PNPC must charge. WPPSS also sees a violation of Sections 1 and 2 of the Sherman Act[35] in the allocation of fixed portions of the

power generated to each of the four organizing companies. However, we agree with the examiner that there is no support in the record that PNPC or the four companies will be in violation of Section 10(h) or the anti-trust laws.

PNPC's proposal is based upon a normal business need to obtain a supply of power, and this will be accomplished by the issuance of a license by a governmental body. It is true PNPC and its component utility companies are not exempt from the anti-trust laws. Immunity from the anti-trust laws is not lightly implied. *California* v. *F.P.C.*, 369 U.S. 482, 485. However, the anti-trust laws do apply differently to regulated companies. See *F.C.C.* v. *RCA Communications, Inc.*, 346 U.S. 86, 93. Utilities are necessarily monopolies within their areas whether they be telephone companies, power companies or gas pipelines, but there is nothing to show that PNPC is trying to monopolize the sources of power in the Pacific Northwest. Of course, it seeks to gain control over the HMS site, but this type of control is inherent in licenses issued under the Act and was clearly intended by Congress.

There is here no price fixing combination, for each company will fix its own prices subject to regulatory control. The four companies have entered into an arrangement to pay the costs of their supply affiliate, PNPC, and to receive a dividend on their capital contributions. Such an arrange-

[35] 15 U.S.C. § 1 and 2.

ment is, of course, subject to our regulatory control under the Federal Power Act. *Pennsylvania Water Power Co.* v. *F.P.C.*, 343 U.S. 414; *Safe Harbor Water Power Corporation* v. *F.P.C.* 179 F. 2d 179 (CA3) certiorari denied 339 U.S. 957. These companies are not competitors in the industrial sense, and in our view this method of obtaining a supply of power was reasonable particularly in view of the enormous costs involved. There is no "public policy that forbids, *per se*, an expansion of facilities of an existing company to meet the needs of new markets . . . ." *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 526.

Likewise, the division of the power between the four companies is not in violation of Section 10(h) or the antitrust laws. This is a joint venture to obtain a supply of electric energy. We have here a business requirement and no attempt to monopolize (*United States* v. *Columbia Steel Co., supra* at p. 527), although, of course, PNPC is seeking control of the HMS ratio in accordance with the Power Act.

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D. Federal Development.

Whether we should recommend federal development rather than development by PNPC is an important issue. We think this issue must be resolved against federal development contrary to the arguments of the Secretary of the Interior. The applicable Section 7(b) of the Power Act provides as follows:

> Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development

as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development. [41 Stat. 1067; 49 Stat. 842; 16 U.S.C. 800]

We agree with our staff and the examiner that the record supports no reason why federal development should be superior to development by PNCP, and we see no reason why we should withhold a license and recommend that the United States build the project.

While we have extensive material before us on the position of the Secretary of the Interior, there is no evidence in the record presented by him to support his position. The Secretary contends initially that we are in effect bound to a decision in favor of federal development, because Congress has made a determination that the water resource (i.e., the Columbia and Snake Rivers) should be federally developed to the extent of nine-run-of-river dams downstream and that the development of the large storage at HMS affects this federal development. We agree, of course, that in meeting our responsibilities under Section 7(b) we should consider the past history of a river basin as it sheds light on the future. While it is true that there are nine federal projects, authorized or constructed on the Snake and Columbia Rivers downstream from the projects here proposed,[36] it is also relevant that we have previously authorized major non-government projects on the main stem of the Columbia above the confluence with the Snake[37] and on the Snake above the HMS site.[38]

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[36] Bonneville, The Dalles, John Day, McNary, Ice Harbor, Lower Monumental, Little Goose, Lower Granite, and Asotin.

[37] See *e.g.*, Priest Rapids, Wanapum, Rock Island, Rocky Reach, Wells.

[38] The Brownlee, Oxbow and Hells Canyon developments of Idaho Power Company.

The fact that the Congress from time to time has authorized considerable federal development within this expansive river basin does not compel a determination that federal development is appropriate with respect to all projects on the river. Our decision must rest upon an evaluation of all the factors relevant to the development on this reach of the Snake at this time.

The factors argued by the Secretary in support of federal development are that federal development offers lower costs, that flood control can be better effected by flexible federal operation than by limitations written into the license, that the Interior Department can better prevent damage to fish than provisions in the license and inadequate supervision by us, that federal development can better provide recreational facilities for an expanding population, and that full co-ordination of the Northwest Power Pool is possible only if the United States constructs and operates the project. He adds that immediate construction of the project would produce an excess of power in the Pacific Northwest which would cause large losses to BPA and severe harm to the economy of the region.

Cost savings to consumers at the expense of the taxpayers of the country at large may, of course, follow from federal development as a result of low cost financing and absence of tax obligations. If this possibility were the criterion, it would be our duty to recommend federal development in almost all cases. Obviously the Federal Power Act does not contemplate any such result.

While flood control (in the event of Canadian storage) and navigation are objectives of lesser significance relative to the proposed projects, provisions in a license with respect to these matters were recommended by the Chief of Engineers, United States Army, were included by the ex-

aminer in his recommended decision and will be included substantially here. The proposed project will provide substantial recreational opportunities. In accordance with recommendations made by the Assistant Secretary of Agriculture we shall provide, as did the examiner, that the licensee shall co-operate with local, state and federal agencies in the study and preparation of a recreation public use plan and that such a plan be filed for approval by the Commission. In addition, Article 17 places an affirmative obligation upon the licensee to construct and operate such recreational facilities as may be necessary and desirable.

As for the fish problem we shall provide, as did the examiner, that the licensee shall construct protective devices and modify the project works and operations as we may prescribe hereafter upon our own motion or upon the recommendation of the Secretary of the Interior or the state conservation agencies. We shall also provide that should the United States desire to construct fish handling facilities, the licensee shall permit the United States to use its property free of cost. We see nothing to lead us to believe that the Federal Government could do more. Specifically, there is nothing in this record to indicate that the purposes described above will not be served as adequately under the license conditions as would be the case under federal development.

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The Secretary of the Interior puts considerable stress on the factor of co-ordination arguing that a federal project would be better co-ordinated with other federal projects downstream. We agree that the Secretary (or any single operator) normally would have a superior ability to co-ordinate the operations of HMS with the other affected projects on the river. But there is no evidence upon which we can determine the scope or the seriousness of this matter

in the context of a river system which already has a number of different project operators and an existing co-ordination system, i.e., the Northwest Power Pool.[39] The parties comprising PNPC are among those having projects on the river. They are members of the Pool and their record of cooperation is good. PNPC has designed its project to be operated and co-ordinated with the Northwest Power Pool in order to benefit all members. To implement this co-ordination and operation we shall use a provision substantially as found in the Wells Project license[40] as requested by both PNPC and the staff, to provide that the licensee shall operate the project in complete co-ordination with the Northwest Power Pool. We have continuing jurisdiction and will insist that this be done. The record does not show that federal ownership is necessary to achieve this result or that proper co-ordination would not be achieved in the absence of federal development.

In short, on the basis of the record here, plus such information of which we can take official notice, there is little if anything which would persuade us that federal development of HMS was inherently superior to licensing it to PNPC even assuming that the actual choice we had before us was between federal construction now and non-federal construction now. But these are not the true alternatives. The Department of Interior has frankly admitted it has no present intention of seeking authorization to commence construction or planning to construct an HMS project. Under these circumstances, federal construction of an HMS project is not foreseeable even assuming Congress would be willing to authorize a federal project where PNPC is will-

[39] This Pool is a voluntary arrangement among utilities, both public and private in the Pacific Northwest area, including BPA for the co-ordination and operation of their affected systems.

[40] *Public Utility District No. 2 of Douglas County, Washington*, Project No. 2149, 28 FPC 128, 133.

ing and eager to construct it under the terms, conditions and provisions of the Federal Power Act.

One of the principal reasons for the Department's opposition to non-federal construction appears to be its concern over a decline in BPA revenues which it feels might be accelerated if HMS power were made available directly or indirectly to some of its existing customers. As indicated above, however, we are convinced that PNPC specifically will have a need for the additional power which could be made available by early construction of HMS, and the Pacific and the West Coast areas, in general, will have a need for the power at the time HMS will be completed.

In summary, the delay inherent in federal construction would foreclose power coming on the line at a time when it will be required. This disadvantage outweighs those benefits which Interior contends would result from federal construction (i.e., superior co-ordination and non-power benefits discussed above), assuming *arguendo*, that such benefits would be realized.

To conclude, Section 7(b) of the Act provides for federal construction where, in our judgment, there is some good reason showing that the development of any water resource for public purposes should be undertaken by the United States. HMS is principally a power project. Neither the record nor our general knowledge of the Columbia River System discloses any major benefits which would result from federal construction over that by PNPC. In the event PNPC is adjudged not to have priority, it might then be necessary to re-evaluate the Secretary's proposal. This would be particularly appropriate respecting WPPSS since its fortunes are so inextricably intertwined with those of the Interior Department.

Recent Developments

On January 22, 1964, it was announced that President Johnson and Prime Minister Pearson signed an agreement under the Canadian Treaty herein referred to. This agreement provides:

1. A schedule for completion of the Canadian storage projects as follows: Duncan Lake, April 1, 1968; Arrow Lakes, April 1, 1969; and Mica, April 1, 1973.

2. The U. S. will use its best efforts to arrange a sale to a single U. S. purchaser of the downstream power benefits for a 30 year period after completion of each project.

3. The total downstream benefits are initially 2,800,000 kws of dependable capacity and about 4 billion kw hours of energy annually.

4. These power benefits will have declined to about 660,000 kw annual dependable capacity and about 4 billion kw hours of energy annually at the end of 30 years.

5. The U. S.[41] and Canada will share equally in the power benefits described above.

6. It is contemplated that the purchaser of the Canadian entitlement will be a non-profit organization now being formed in the U. S. by certain public and private utilities in the Pacific Northwest.

Implementation of this agreement will significantly reduce the superiority of Nez Perce over HMS for flood control purposes as described herein pages 7, 14, and 20 *supra*. In addition, this agreement will substantially add to the power resources of the Pacific Northwest. Nevertheless, there is nothing which presently indicates that this new supply of power obviates the feasibility of licensing the

[41] Under the treaty BPA will have about 70 percent of the U.S. share and the owners of the non-federal base system projects will have the balance.

HMS project to PNPC at this time. Accordingly, the Commission has decided that a license should be issued, as previously determined.

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The Commission further finds:

(1) The Snake River is a navigable water of the United States at least as far upstream as the upper limits of the reservoir of either the High Mountain Sheep or the Nez Perce Projects (In re *Idaho Power Company*, Project No. 1971, Opinion No. 283, 14 FPC 55, 72). The respective project works will be located on lands of the United States, and the reservoir will inundate lands of the United States.

(2) Pacific Northwest Power Company is a private corporation organized under the laws of the State of Oregon as a wholly-owned subsidiary of four sponsoring companies, namely, The Montana Power Company, Pacific Power & Light Company, Portland General Electric Company, and Washington Water Power Company.

(3) Washington Public Power Supply System is a municipal corporation organized and operating under and by virtue of the laws of the State of Washington, for the purpose of acquiring, constructing, and operating electrical generating and transmission facilities.

(4) Pacific Northwest Power Company, on March 31, 1958, filed an application under the Federal Power Act for the proposed High Mountain Sheep Project (No. 2243), also referred to as the Middle Snake River Project, to be located at river mile 189.2 on the Snake River just above the confluence of that river and the Salmon River.

(5) Washington Public Power Supply System, on March 15, 1960, filed an application under the Federal Power Act for the proposed Nez Perce Project (No. 2273) to be located

at river mile 186.2 on the Snake River just below the confluence of that river and the Salmon River.

(6) Public notice of these proceedings has been given as required by the Act.

(7) Either the High Mountain Sheep or the Nez Perce Project, whichever may be constructed, would be located in or along a navigable water of the United States and would otherwise affect the interests of interstate or foreign commerce.

(8) The Department of the Interior has requested that that the Commission recommend to Congress that the High Mountain Sheep Dam should be built by the United States.

(9) Subject to the terms and conditions hereafter specified, the HMS project is best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes.

(10) PNPC has a statutory priority for its application for the High Mountain Sheep Project (No. 2243) by virtue of a preliminary permit issued by the Commission on April 8, 1955 and WPPSS is not entitled to a preference under Section 7(a) of the Federal Power Act.

(11) Subject to the terms and conditions set forth below, the plans of PNPC to develop the HMS site are best adapted to conserve and utilize in the public interest the water resources of the region, and PNPC is able to carry out such plans.

(12) The development of the HMS project should not be undertaken by the United States itself.

(13) The installed horsepower capacity for the HMS project here authorized is 1,166,700 horsepower for the purpose of computing the administrative annual charge.

(14) The amount of the annual charge to be paid under the license for the HMS Project for the purpose of reimbursing the United States for the cost of the administration of Part I of the Act is reasonable as hereinafter specified.

(15) It is desirable to reserve for future determination the amount of annual charges to be paid under a license for the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands.

28790

The Commission orders:

(A) A license is hereby issued to PNPC (hereinafter referred to as Licensee) under Section 4(e) of the Federal Power Act for a period of 50 years, effective as of the first day of the month in which acknowledgment of acceptance thereof is filed with the Commission by PNPC for the construction, operation and maintenance of Project No. 2243, to be known as the High Mountain Sheep project on the Snake River and its tributaries, Idaho and Oregon, affecting navigable waters of the United States and the interest of interstate or foreign commerce and lands of the United States within and outside of Wallowa, Nez Perce and Payette National Forests, subject to the terms and conditions of the Act which is incorporated herein by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(i) The proposed project consists of:

All lands constituting the project area and enclosed by the project boundary or the limits or which are otherwise defined, and/or interest in such lands necessary or appro-

priate for the purposes of the project, whether such lands or interest therein are owned or held by the applicant or by the United States; the general location of such project area being shown and described by certain exhibits which formed part of the application for license, or amendment thereof and which are designated and described as follows:

Exhibit	FPC No.	Showing
J	2243-1	General Map of Project Area
K (as amended)	2243-2 through 4, 6 through 20 and 43 (amended and revised)	Project Area (tentative)

(ii) All project works consisting of a concrete arch dam approximately 670 feet high, creating a reservoir extending about 58 miles upstream to Hells Canyon tailwater (Project No. 1971) on the Snake River and about 10 miles upstream on the Imnaha River with normal water surface area of about 17,300 acres and gross storage capacity of 3,600,000 acre-feet at normal water surface elevation 1510, of which 2,250,000 acre-feet would be usable with a draw down of 173 feet; a chute-type radial-gate controlled spillway located at the right abutment; low level intakes; two outdoor type powerhouses, one on each side of the river immediately downstream of the dam, having an initial installation of five units with each turbine rated 285,000

horsepower at 550-foot head and each generator rated 175,000 kw (184,000 kva at 0.95 power factor); three on the (left bank) Oregon side and two units on the (right bank) Idaho side, with provisions in the plans for the addition of five similar units, two on the left bank and three on the

right bank; and appurtenant electrical and mechanical facilities; the location, nature, and character of which are more specifically shown and described by the exhibits hereinbefore cited and by other exhibits which also formed a part of the application for license as amended and which are designed and described as follows:

Exhibit	FPC No.	Showing
L Sheet 30, amended and revised	2243-44	General Plan
L Sheet 31, amended and revised	2243-45	Profile and Sections
L Sheet 32, amended	2243-37	Powerhouse Plans
L Sheet 33, amended and revised	2243-46	Powerhouse cross-sections
L Sheet 34, amended and revised	2243-47	Intake and Spillway sections
L Sheet 35, amended and revised	2243-48	Arch Dam

M: "General Description and Specifications of Equipment" regarding High Mountain Sheep project.

(iii) All other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful, in connection with the project or any part thereof, whether located in

or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Commission; also, all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance or operation of the project.

28792

(B) This license is also subject to the terms and conditions set forth in revised Form L-6, November 1, 1963, entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and Lands of the United States" which terms and conditions designated as Articles 1 through 37, are attached hereto and made a part hereof, except for Articles 7, 8, 9 and 15 thereof; and subject to the following special conditions set forth herein as additional articles:

Article 38. The Licensee shall commence construction of the High Mountain Sheep project within two years of the effective date of this license, shall thereafter in good faith and with due diligence prosecute such construction and shall complete the project and place it in operation within seven years from the effective date of this license.

Article 39. The Licensee shall engage at least three qualified independent consultants for the purpose of reviewing and reporting on the exploration program of the dam site, the excavation plan for the dam foundation treatment and the design of the arch dam and other major hydraulic structures. The report of the consulting engineers shall be submitted for Commission consideration not later than the date upon which design drawings (Exhibit L) for the dam structure are filed pursuant to Articles 40, 41, and 42.

Article 40. The final design of the arch dam shall be verified by an acceptable method of analysis (such as the

trial load method) and reviewed by the use of structural models.

Article 41. The final design of the spillway shall be based on hydraulic model tests.

Article 42. The Licensee shall submit, in accordance with the Commission's rules and regulations, revised Exhibit L drawings for the project structures and Licensee shall not begin construction of the project works until the Commission approves the exhibit.

Article 43. The Commission reserves the right to determine at a later date what transmission facilities shall be included in this license as part of the project works.

Article 44. The Licensee shall consult with the Forest Service in determination of the centerline location of transmission lines on or affecting national forest lands and shall secure concurrence of the Forest Service to the specific location of those lines occupying lands administered by the Forest Service.

28793

Article 45. The Licensee shall not make any claim under the authority of this license against the United States or any water users' organization claiming through the United States for any damage resulting from any future depletion in the flow of the waters of the Snake River and its tributaries for the irrigation of lands and other beneficial consumptive uses.

Article 46. The Licensee shall make availabe to the Idaho State College, upon further order of the Commission at the request of the Idaho State College, reasonable sums of money not to exceed $7,500 for the purpose of undertaking an archeological survey and salvage excavations prior to construction and flooding.

Article 47. The Licensee shall, in order to secure maximum recreational benefits, make every reasonable effort to maintain the water surface of the High Mountain Sheep reservoir at the highest level practicable from June 15 to September 15, of each year, as is consistent with the primary purposes of the reservoir to provide pondage for Licensee's daily, weekly, monthly or seasonal power requirements; requirements of downstream releases; and flood control.

Article 48. The Licensee shall within one year from the date of issuance of the license, file with the Commission for approval its proposed recreational use plan for the project. The plan shall be prepared after consultation with appropriate Federal, State and local agencies, and shall include recreational improvements which may be provided by others in addition to the improvements the Licensee plans to provide.

Article 49. The road or roads constructed, owned or controlled by the Licensee for the project developments, shall be made available without charge to the Forest Service, its timber operators, permittees, and other users, for the orderly administration, development, and protection of the national forests involved, and for operations necessary and incident to project development, provided that such use may be limited by reasonable safety and traffic control requirements. In appropriate circumstances and as agreed to by the Forest Service, the Licensee may require payment of the user to cover a fair share of the road maintenance costs.

Article 50. The Licensee shall, prior to impounding water, clear all lands in the bottom and margins of the reservoir between a plane five feet below ultimate low water elevation (El. 1337) of the reservoir and the plane at

normal pool elevation of the reservoir, and shall cut all brush and trees below the lower plane so that none protrude above elevation 1332. The Licensee shall clear and keep clear to an adequate width lands of the United States along open conduits; and shall dispose of all temporary structures, unused timber, brush, refuse, or inflammable material resulting from the clearing of the lands or from the construction and maintenance of the project works. In addition, all trees along the margin of the reservoir which may die due to operation of the reservoir shall be removed. The clearing of the lands and the disposal of the material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission.

28794

Article No. 51. In the interests of flood control downstream from the project, the Licensee shall operate the project in accordance with an agreement to be entered into by the Licensee and the United States Corps of Engineers for the purpose of determining detailed operating procedures for use during flood periods, in accordance with the following principles:

a. The total live storage space of about 2,250,000 acre-feet between elevation 1337 and elevation 1510 mean sea level will be made available for flood control use if and as required.

b. The reservoir level will be no higher than elevation 1475 by 1 March each year to provide about 600,000 acre-feet of storage space for flood control use at that time each year. Additional storage space will be made available between 1 March and the beginning of the flood period to insure the availability on 1 May of the total capacity needed for flood control as estimated by the Corps of Engineers.

c. The space made available as set forth above will be retained until capture of flood flows is requested by the

Corps of Engineers, subject to involuntary storage as may be required due to excess of inflows over outlet capacity, or until refilling is authorized by the Corps of Engineers. In the event of involuntary storage during flood control operations, full storage capability will be regained as soon as possible.

d. During the flood storage period controlled outflows will be as warranted by the flood control requirements as determined by the Corps of Engineers with due regard to the requirements for the optimum multiple purpose operations of the project. When the Columbia River discharge at The Dalles is 600,000 cfs or higher the daily outflow may be reduced to a minimum of 10,000 acre-feet; except that during years of severe flood conditions the daily outflow may be reduced to a minimum of 4,000 acre-feet; below 600,000 cfs discharge at The Dalles, the outflow will be determined with due consideration given to all purposes of the project.

e. A discharge capacity of 65,000 cfs at minimum pool elevation 1382 is to be provided by the Licensee. This discharge capacity is based on the gated outlet capacity plus one half of the ultimate turbine hydraulic capacity.

The agreement will be subject to review from time to time as requested by the Licensee or the Corps of Engineers.

Article 52. In the interest of navigation the project shall be operated in accordance with the following requirements:

28795

a. Minimum flow of not less than 13,000 cfs will be maintained at Lime Point, Idaho, during annual storage refill season when determined to be required by the Corps of Engineers in the interest of navigation. Flows of up to 16,500 cfs may be required at other times when determined

by the Corps of Engineers to be necessary in the interest of navigation.

b. River fluctuations in the reach between Lewiston and Lime Point resulting from project operation shall not exceed a rate of one and a half feet per hour on the rising stage, and one foot per hour on the falling stage unless otherwise approved by the Corps of Engineers.

Article 53. The Licensee shall, for the conservation, and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance and operation of such facilities and comply with such reasonable modifications of the project structures and operation as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior, the Oregon State Game Commission, the Fish Commission of Oregon, or the Idaho Department of Fish and Game, after notice and opportunity for hearing and upon findings based on substantial evidence that such facilities and modifications are necessary and desirable, reasonably consistent with the primary purpose of the project, and consistent with the provisions of the Act.

Article 54. The Licensee shall prior to beginning of operation of the Low Hells Canyon development of Project No. 1971, enter into an agreement with the Idaho Power Company, Licensee for Project No. 1971, to compensate that Company for backwater effect on the Low Hells Canyon development of Project No. 1971 constructed in accordance with plans approved by the Commission, resulting from the operation of the High Mountain Sheep project with maximum normal pool at elevation 1510 feet at the High Mountain Sheep dam. In the event no satisfactory agreement is concluded by such time, then upon the application of the Idaho Power Company, the Commission

shall fix and determine the compensation to be made by Licensee for such encroachment after notice and opportunity for hearing.

Article 55. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of its upstream and downstream fish passage and handling facilities with those for Project No. 1971 of Idaho Power Company, as the Commission may direct upon recommendation of the Secretary of the Interior, the Oregon State Game Commission, the Fish Commission of Oregon, or the Idaho Department of Fish and Game.

Article 56. The Licensee shall pay to the United States the following annual charges:

a. For the purpose of reimbursing the United States for the costs of administration of Part I of the Act, a reasonable annual charge in accordance with the provisions of Part 11 of the Commission's regulations. The authorized installed capacity for such purposes is 1,166,700 horsepower;

b. For the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands exclusive of those used for transmission-line purposes an amount to be fixed hereafter by the Commission; and

c. For the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands for transmission-line purposes an amount to be fixed hereafter by the Commission.

(C) The exhibits described in paragraph (A) above are approved as part of the license for the project.

(D) The Licensee shall within one year from the effective date of the license, file with the Commission a plan of financing for Commission approval, and the Commission

reserves the right to require such additional information as it may deem necessary before taking final action on the plan of financing. The Licensee shall not commence construction prior to Commission approval of a plan for financing the project.

(E) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313(a) of the Federal Power Act, and failure to file such an application shall constitute acceptance of this license. In acknowledgment of the acceptance of this license, it shall be signed for the Licensee and returned to the Commission within 60 days from the date of issuance of this order.

(F) The motion filed by WPPSS on September 12, 1961, for leave to conform its pleadings to the evidence is hereby granted.

(G) The application of WPPSS for license for Project No. 2273 is hereby denied.

(H) The request of the Secretary of the Interior that Federal development be recommended is hereby denied.

(I) The examiner's opinion and findings are hereby adopted as part hereof to the extent not inconsistent herewith.

(J) Exceptions not granted are hereby denied.

By the Commission. Chairman Swidler dissenting filed a separate statement appended hereto. Commissioner Black dissenting filed a separate statement appended hereto.

(SEAL)

/s/ J. H. GUTRIDE,
Joseph H. Gutride,
Secretary.

28797

Project No. 2243, *et al.*

IN TESTIMONY of its acknowledgment of acceptance of all of the provisions, terms and conditions of this license Pacific Northwest Power Company, this .. day of ...., 1964, has caused its corporate name to be signed hereto by ..... its ..... President, and its corporate seal to be affixed hereto and attested by ....., its .....Secretary, pursuant to a resolution of its Board of Directors duly adopted on the .. day of ....., 1964, a certified copy of the record of which is attached hereto.

PACIFIC NORTHWEST POWER COMPANY

By _____
President

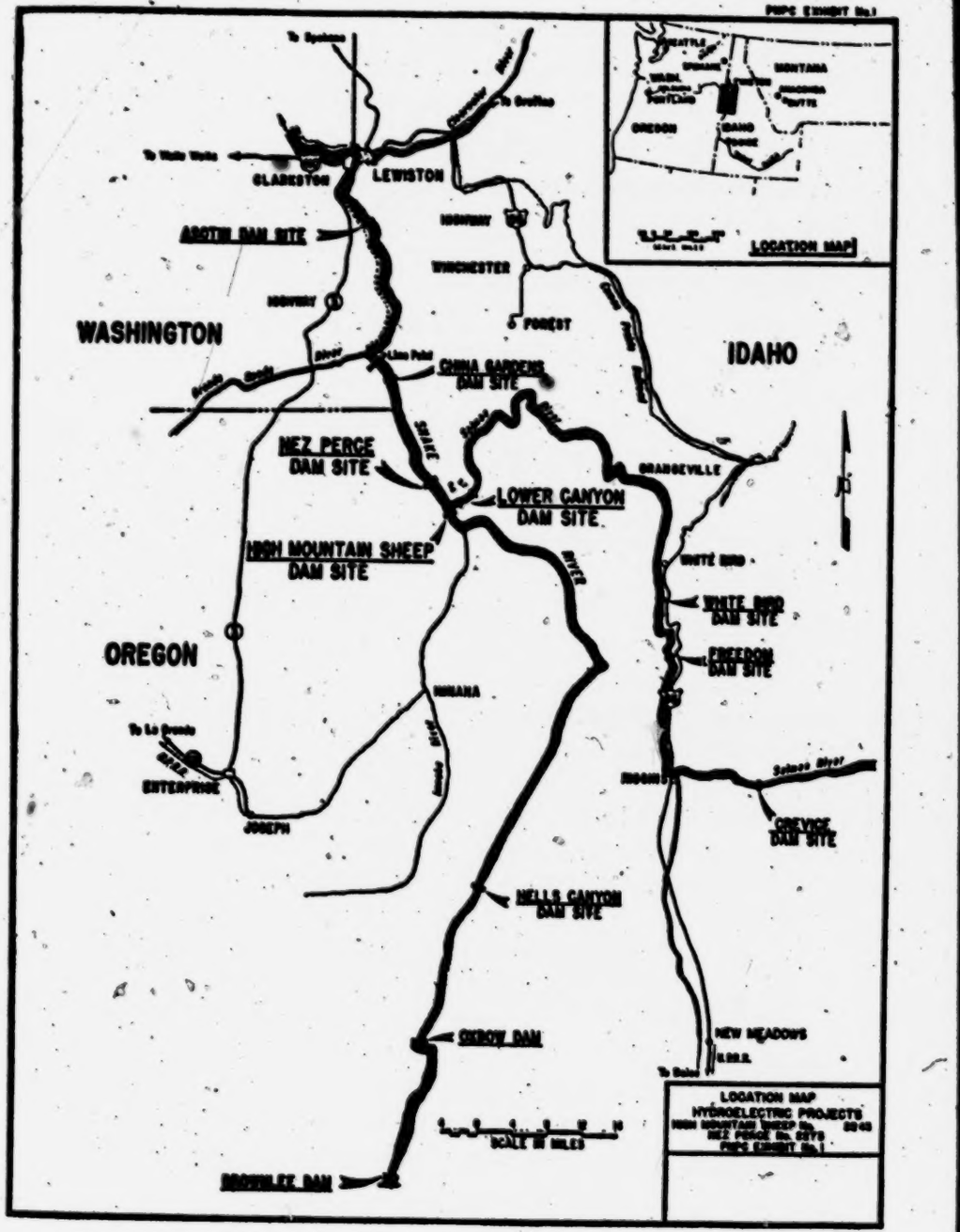
Attest:

_____
Secretary

(Executed in quadruplicate)

28798

Appendix A


WASHINGTON
OREGON
IDAHO
LEWISTON
CLARKSTON
ASOTIN DAM SITE
WINCHESTER
FOREST
CHINA GARDENS DAM SITE
NEZ PERCE DAM SITE
LOWER GANYON DAM SITE
HIGH MOUNTAIN SHEEP DAM SITE
GRANGEVILLE
WHITE BIRD
WHITE BIRD DAM SITE
FREEDOM DAM SITE
ENTERPRISE
JOSEPH
IMNAHA
GRIEVE DAM SITE
HELLS CANYON DAM SITE
SNAKE RIVER
SNAKE RIVER
SNAKE RIVER

28799

Project No. 2243
PACIFIC NORTHWEST POWER COMPANY

Project No. 2273
WASHINGTON PUBLIC POWER SUPPLY SYSTEM

(Issued February 5, 1964)

SWIDLER, Chairman, *dissenting:*

I dissent from the Commission's action in granting a license for the High Mountain Sheep Project to the Pacific Northwest Power Company, because the Commission has rejected the command of Section 7(a) of the Act to grant WPPSS a preference. This dissent is limited to that single question; I accept the result reached by the majority on the question whether the High Mountain Sheep Project or the competing Nez Perce Development is "best adapted to a comprehensive plan" of development for the Upper Snake River. I do not dissent on this phase of the case despite the superiority of Nez Perce as a hydroelectric development because on this record it is improbable that the anadromous fish runs on the Salmon River could be preserved if Nez Perce were constructed. This fact is crucial inasmuch as the applicants have not attempted to carry the burden of demonstrating, and the record does not demonstrate, that it would be in the public interest to approve Nez Perce at the cost of the destruction of the anadromous fish runs.

I

THE PREFERENCE CLAUSE OF THE FEDERAL POWER ACT REQUIRES THAT A LICENSE BE GRANTED TO WPPSS

In my judgment section 7(a) of the Federal Power Act, the preference clause, requires the Commission to award a license in this case to WPPSS, a preference applicant. I

consider this to be the plain meaning of the words used by the Congress in section 7(a).

Section 7(a) provides as follows:

> In issuing * * * licenses where no preliminary permit has been issued * * * the Commission *shall* give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; * * * [emphasis supplied]

The command is flat. The preference accorded WPPSS by the statute is mandatory and is qualified by only one exception, the case in which another applicant has obtained a prior preliminary permit pursuant to sections 4(f) and 5 for the particular project for which it seeks a license.

28800

Before discussing the Commission's reasoning in support of its attempt to bring PNPC within the one narrow exception to the preference clause, it will be instructive to examine the legislative history of the Act in order to appreciate the importance which Congress placed on its mandate to the Commission to comply with the provisions for a preference to public agencies.

If the language left any doubt, the legislative history shows that section 7(a) was designated to cover precisely the case before us. Rarely has Congress visualized with such prescience the possibility that the administrators of a statute would attempt to frustrate the Congressional intent, and been at such pains to make clear what it meant. Indeed the Congressional intent that the preference applicant be licensed in the circumstances of this case would hardly have been clearer if Congress itself had designated

it as the licensee by name. The Commission's decision is therefore particularly egregious and unfortunate.

The Federal Water Power Act was finally passed in 1920, after more than a decade of abortive attempts to pass an effective Act dealing with the water resources of the country.[1] The idea of giving a preference to municipalities or other state agencies—which has become a standard feature of Federal water resource development legislation—appeared in the history of water power legislation as early as 1914, in H.R. 16673 (Ferris Bill No. 1), which passed the House on August 24, 1914, but failed in the Senate.

The early prototypes of the Water Power Act of 1920 framed the preference provision in discretionary terms, empowering but not requiring the Commission to give preference to public bodies.[2] As finally enacted the discretionary language was eliminated and instead the law states that the Commission "shall" give preference.

During the hearings before the House Committee on Water Power on the Administration-backed water power bills, the idea of a mandatory preference was first broached by Congressman (later Senator and Vice President) Alben W. Barkley who offered an amendment to section 7 to require that preference "shall" be given, saying:

> • • • what we want is to get section 7 amended so as not to provide that this Commission *may* give preferences

[1] The history of water power legislation through June 24, 1919, is set forth in House Report No. 61, accompanying H.R. 3184, June 24, 1919, Committee on Water Power, 66th Congress, 1st Session, p. 2, *et seq.*

[2] *e.g.*, H.R. 16673, 63rd Cong., 2d Session (for text see H. Rept. 842, June 16, 1914, 63rd Cong., 2d Session); S. 1419, 65th Cong., 2d Sess. (See Exhibits A & B in H. Rept. No. 715, 65th Cong., 2d Sess.)

to municipalities, but that they *shall* give preference to municipalities whenever the conditions are equal or similar.[3] [Emphasis supplied]

The bill that emerged from Committee did not contain Mr. Barkley's amendment, still leaving the granting of preference within the discretion of the Commission.

When the bill was debated in the House, Mr. Doremus offered an amendment to the first paragraph of Section 7 (underlined words are additions; words with line through them are deletions):

> That in issuing preliminary permits or licenses hereunder the commission ~~may in its discretion~~ shall give preference to applications therefor by States and municipalities provided the plans for the same are deemed by the commission ~~to be best~~ as well adapted to conserve and utilize in the public interest the navigation and water resources of the region as the plans of other applicants; * * * (56 Cong., Rec. 9775).

Mr. Doremus made it clear, in response to a question by Mr. Welsh, that his amendment:

> * * * makes it *mandatory* upon the commission to grant the license to the State or municipality, if the plans submitted by it are, in the judgment of the commission, as good as those submitted by the private applicant. [Emphasis supplied] (56 Cong. Rec. 9804).

The amendment was then modified further by eliminating the words, "as well," and the last words, "as the plans of other applicants." (56 Cong. Rec. 9805) It was then passed by the House. As passed, it read as follows:

[3] Hearings before the House Committee on Water Power, House of Representatives, Parts 1-4, 65th Cong., 2d Sess., 1918, p. 814.

> That in issuing preliminary permits or licenses hereunder the commission shall give preference to applications therefor by States and municipalities provided the plans for the same are deemed by the commission adapted to conserve and utilize in the public interest the navigation and water resources of the region.

Thus, the amendment originally proposed by Congressman Barkley in the House Hearings was accepted and, as we know, eventually became a part of the Act. In the Senate, the change of the words "may in its discretion" to "shall" was made without discussion (59 Cong. Rec. 1532).

Under the terms of section 7 as originally proposed a preference applicant was entitled to a preference if its plans as initially submitted "are deemed by the Commission equally well adapted * * * to conserve and utilize in the public interest the water resources of the region." But the Congress went even further to make the preference for municipalities meaningful and effective.

It was during the concluding debates of the Congress on the Federal Water Power Act that the words "or shall within a reasonable time to be fixed by the Commission be made equally well adapted" were added to section 7. The amendment was sponsored by Mr. Sinnott in the House of Representatives, and his reasons for introducing it are directly in point:

> Mr. Chairman, . . . I do not want to see a municipality foreclosed and concluded in case its plan is not as good as some other plan. I think if the municipality or the State is willing to amend or modify the plan first filed by it and make that plan as good as the other plan filed, that it should have that opportunity, and my amendment seeks to give the municipality that oppor-

tunity to modify and amend its plan and make it as good and as efficient as any other plan filed. (58 Cong. Rec. 2037-2038)

Mr. Sinnott's amendment passed, emerged as part of section 7 of the Federal Water Power Act, and remains in the present Act.

The Commission, while not basing its holding on this point, apparently was influenced by its conclusion that WPPSS does not have as great a present need for the power from HMS as does PNPC and that WPPSS could not market all of the power to public agencies until

"some indefinite time after 1970." Even if we assume that the "equally well adapted" requirement applies to WPPSS's marketing plans, in itself a doubtful interpretation, the legislative history makes plain that WPPSS need not show an immediate market to preference customers for all of the HMS power. In fact, such a requirement was expressly rejected by the Congress.

After Mr. Sinnott's amendment to section 7 passed, an amendment was offered to limit the preference for municipalities and States to "the extent such power is to be used by such States and municipalities for State or municipal purposes." (58 Cong. Rec. 2039). This amendment was defeated by the House after Mr. Sims, with a remarkable understanding of the future growth in the demand for electricity, stated in opposition:

> The gentleman's amendment would prevent a city or town from applying for a license and developing water power unless the city at the time it applied for it had need, for purely municipal purposes, for the whole amount of power to be developed. All cities are growing. Suppose here is a city that has a population of

> 100,000. There is a water-power site within reach of the city of 100,000 population, and it will produce power fully developed for a city of 200,000. Now the gentleman's amendment would prevent that city from receiving a permit or making application—would prevent it from having an opportunity to develop the site—unless it can use the whole output for immediate municipal purposes.
>
> • • • •
>
> These things were well studied in the committee, as the gentlemen knows, and our intention was in every case to give the State or municipality preference for a permit and license and without charge to the extent of the power used for State or municipal purposes. To deny a license unless the city or municipality or State shall couple with it that it will develop only to the extent it may be needed for municipal purposes is vicious and wrong in principle. (58 Cong. Rec. 2039-40)

The example used by Congressman Sims in speaking against the amendment to limit the preference is analogous to the case at hand. WPPSS has proven with reasonable certitude that it will develop a

market among its members and other supporting public and cooperative agencies during the 1970's for the power that would be produced by the Nez Perce project.[4] *A fortiori*

[4] The options and commitments held by WPPSS represent a total estimated average load in 1971 according to WPPSS of 1992 megawatts or, according to PNPC's claim, of 1324 megawatts, and in ten year's time these loads can be expected to approximately double. Estimated dependable capacity for Nez Perce is approximately 1850 mw; for PNPC's—HMS project, 930 mw; and for the WPPSS—HMS project, 1218 mw.

The growth in the loads of the public agencies on either basis can thus absorb the output of the HMS project in the next decade.

this market would absorb the output of the smaller HMS project. It has also been shown that there is likely to be a regional market for this output, both prior to and during the 1970's, no matter who is operating the project, and WPPSS is essentially a regional power supplier. The situation is essentially that which Congressman Sims posited of a preference agency which can ultimately, if not immediately, be expected to consume the entire out-put of a site. The case for WPPSS then falls squarely within the boundaries of a clearly articulated Congressional intent.

A portion of Mr. Sinnott's statement in support of his proposed amendment to section 7 bears repeating at this point:

> . . . I do not want to see a municipality foreclosed and concluded in case its plan is not as good as some other plan. I think if the municipality or the State is willing to amend or modify the plan first filed by it and make that plan as good as the other plan filed, that it should have that opportunity, and my amendment seeks to give the municipality that opportunity . . .

Mr. Sinnott's amendment was adopted.

The legislative history thus demonstrates that Congress intended no loophole in providing that a municipality which has a preference over a competing non-preference applicant must be given a preference and also afforded reasonable time to make its plans equally well adapted to conserve and utilize the water resources in the public interest. Even the opponents of section 7 were aware of the implications of the section. As Senator Phipps stated in the Senate debate (59 Cong. Rec. 1173):

> . . . under the provisions of the bill [a] municipality can look over the ground and file on it, either the same or, as they may think, a better plan and secure the

permit, to the disadvantage of the one who first discovered the possibilities of the stream.

28805

This seemed grossly unfair to the opponents of section 7, but they lost. What they opposed came to pass and became the law. Section 7 was passed precisely to cover the situation in the case before us, and the wisdom and fairness of that Act are not here for decision. The expressed intention of the proponents of section 7, the stated fears of the opposition, as well as the clear language of the section itself, compels the conclusion that WPPSS is entitled to a license in this proceeding. To hold otherwise is to substitute our balancing of the equities for the command of Congress.

II

PNPC Is Not Entitled to a Priority Under Its Preliminary Permit

The starting point in determining the application of the preference clause in this case is to examine its meaning in relation to the over-all scheme of the statutory provisions relating to preliminary permits. PNPC cannot overcome the preference to WPPSS unless it has a priority by virtue of a presently effective preliminary permit for the HMS project.

Section 4(f) of the Federal Power Act authorizes the Commission to issue a preliminary permit to applicants for the purpose of securing the data necessary to support a license application for a hydroelectric project. Section 4(f) expressly requires that the Commission:

> . . . before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by

such application; and shall also publish notice of such application . . . in the county or counties in which the project or any part thereof or the lands affected thereby are situated.

Section 5 provides that permits shall be for the sole purpose of maintaining priority of application for a license during the period required for making preliminary examinations and surveys for a project, but not exceeding a total of three years.

The statute standing alone clearly gives the Commission discretion in granting a permit to define the scope of the grant by limiting it to a specified project. Indeed, it would seem that a definite description of the scope of the project and the limits of its boundaries was expressly contemplated by the above-quoted requirements of section 4(f) so that agencies entitled to a preference would not lose their rights without clear notice and opportunity for a hearing.

28806

The preliminary permit is the means designated by Congress for initiating a hydroelectric license proceeding and municipalities are entitled to a preference for permits as well as for licenses. It cannot be assumed that Congress intended that the permits, which are the sole means of extinguishing their preference rights, were to be awarded in such vague and uncertain terms that preference agencies would have no notice that their preference interest in particular locations was involved in a permit application. At any rate, the permit granted to JNPC was not vague and uncertain, but was definite and limited. The statute impels the conclusion that a permit should not be broadened beyond its terms for purposes of defeating the statutory preference to a license.

The preliminary permit on which PNPC relies had its genesis on November 9, 1954, when PNPC filed an application for a preliminary permit for Mountain Sheep and Pleasant Valley Projects on the Snake River. The cover of this application reads in pertinent part as follows:

Application for Preliminary Permit

for

Mountain Sheep Hydroelectric Project

. . .

and

Pleasant Valley Hydroelectric Project

A preliminary permit was granted to PNPC by the Commission "for the sole purpose of maintaining priority of application for a license for Project No. 2173 (Mountain Sheep-Pleasant Valley)." Upon the basis of this application and permit, PNPC now asserts a claim of priority in licensing under the section 5 of the Federal Power Act[5] for an altogether different project sited at a different location, High Mountain Sheep.

The question whether PNPC can claim priority over WPPSS on the strength of this preliminary permit is a three-fold one: whether HMS was within the scope of its preliminary permit issued for the Mountain

Sheep-Pleasant Valley project; whether the preliminary permit remained effective after the denial of its license application for the MS-PV project and whether PNPC's license application for High Mountain Sheep perfected within the three years statutory limit of a preliminary permit.

[5] The text of section 5 of the Federal Power Act is set forth at p. 22.

PNPC cannot prevail unless all three questions are answered affirmatively. In my judgment all three must be answered negatively.

As recounted by the majority, PNPC applied for and was issued a preliminary permit to expire April 1, 1958, for the MS and PV dams. The public notice of the preliminary permit for the project was limited to a description of the proposed MS and PV Dams. There was no suggestion that the permit was to cover any other project. The Commission, on April 8, 1955, granted PNPC just exactly what it requested—a preliminary permit—"for a license for Project No. 2173 (Mountain Sheep-Pleasant Valley)."

After receiving this preliminary permit PNPC filed an application for a license covering these two dams, and after a hearing this license application was denied by the Commission on January 20, 1958. PNPC limited its studies under the permit to the two-dam development for which it had sought a license because the two-dam development avoided interference with salmon runs up the Imnaha River. PNPC specifically instructed its engineers to confine their investigations to sites above the mouth of the Imnaha (PNPC Brief, pp. 327-28). The reports made by PNPC to the Commission under its preliminary permit also reveal that no studies were made of the HMS site during the three-year term of the permit.

Let us assume for discussion purposes with the majority that PNPC's preliminary permit remains in effect eight and one-half years after it was issued. What is its scope? Did it in fact cover the HMS project?

I believe that plain provisions of the permit and the facts of this case make clear that the HMS project, for which PNPC is today awarded a license, was not within the scope of the preliminary permit for Mountain Sheep-Pleas-

ant Valley, and that PNPC cannot legitimately claim a priority right to a license for the HMS project.

It is dispositive of the whole case that PNPC never sought—indeed, that it deliberately avoided seeking—a preliminary permit for HMS. The application for preliminary permit for Mountain Sheep-Pleasant Valley Project No. 2173 specifically described the two dams in the project, giving their location and their capacity, and the

permit was issued "for the sole purpose of maintaining priority of application for Project No 2173 (as described) . . ." The preliminary permit's application to these two specific dams was made plain from the outset, as we have already noted, by the very cover of the application, as well as by every detail of the text.

HMS is a project for a single dam of different size and generating capacity and located below the mouth of the Imnaha River, in contrast to the Mountain Sheep and Pleasant Valley projects. The order issuing the preliminary permit, PNPC's studies and reports under the permit, the hearing on the initial application for license, the denial of license for Mountain Sheep-Pleasant Valley—all of these related only to the Mountain Sheep-Pleasant Valley development, to the exclusion of HMS.

It would seem to be beyond question that the priority afforded by a preliminary permit is limited to the site specified therein. As the Commisison said in *Chatanika Power Co., Inc.*, Project No. 2294, 26 FPC 751 at 752.[6]

> The permit * * * represents a valuable privilege, for it prevents others from securing consideration of an

[6] See also *Linoma Power Co.*, 8 FPC 999 at p. 1000, cited by the majority where the Commission refers to "a particular project covered by the permit."

application for the *particular site in question* during the term of the permit. [emphasis supplied.]

The *Chatanika Power Co.* case is but another application of the established rule of law that a governmental grant of a permit is to be strictly construed. As the Supreme Court stated in *Louisville Bridge Co.* v. *U. S.*, 242 U.S. 409 at p. 417 (1917):

> . . . when private rights of an indefeasible nature are sought to be derived from regulatory provisions established in the exercise of this power, the case is peculiarly one for the application of the universal rule that grants of special franchises and privileges are to be strictly construed in favor of the public right, and nothing is to be taken as granted concerning which any reasonable doubt may be raised.

In this case PNPC applied for and was granted a permit for the two specific sites and the terms of the permit were completely clear that it was limited to those sites. I do not mean to suggest that the Commission could not grant a permit with a broader scope but it is hard to imagine how a permit could state its limitations any more clearly than was done in the instant case.

28809

I therefore conclude that the Commission never intended that the preliminary permit cover the HMS project which was completely different from Mountain Sheep and Pleasant Valley; and that in fact the preliminary permit by its terms did not include the HMS project.

This is not to say that an applicant must accurately guess in advance of exploratory engineering studies under a preliminary permit the exact results of these studies. No such impossible demands need be read into the Act.

Rather, it is the applicant's responsibility to seek an amendment reflecting any significant changes in the scope of the permit which become warranted by the studies. Amendments to preliminary permits are authorized by the Commission's regulations. (Regulations under the Federal Power Act, Section 4.84) Obviously the statutory notice requirements for the protection of preference customers would be meaningless if the scope of a permit were not limited by its words and could be enlarged by unilateral action of the permittee without knowledge of other interested parties whose rights may be affected. PNPC has shown its awareness of the need for such amendments in other license proceedings (13 FPC 1656) and in the present proceeding, as reflected in a motion it made and later withdrew for a declaratory order seeking a ruling on the scope of the preliminary permit upon which it now relies.[7]

To be sure, it is desirable that an applicant be allowed flexibility and be encouraged to study all reasonable alternatives, including those not known at the time of application for a permit. The way to obtain this flexibility, however, is by allowance of needed amendments, not by construing permits which purport to cover specific projects as being in effect a charter for a broad stretch of the river, thereby concealing the scope of the permit from the public and interested preference customers.

The rule enunciated by the majority means that a permit for a particular project affords the applicant a priority over any other projects "affecting essentially the same reach of the river." Applied to this case it means that the preliminary permit to PNPC for two low dams granted it a priority over any other applicant for High Mountain Sheep or Nez Perce, both of which projects affect the same reach of the Snake River, even though both High Mountain Sheep

[7] See page 23, *infra*.

and Nez Perce are downstream from the two low dams, flood out portions of other rivers (the Imnaha and the Salmon) and by any fair standard are different projects from the MS-PV project.

I find the majority's reasoning both mystifying and unreasonable.

28810

The majority position is mystifying because it interprets a permit application as meaning something other than what it says. Were some compelling reason of Congressional purpose advanced in support of this transmutation, I might be persuaded, but no reason is given. The proper course for an applicant in PNPC's circumstances, as already suggested proposed in it permit application which would put everyone on notice of its broad scope or to file a specific description and later seek to amend it to reflect any significant changes.

The majority's position is unreasonable because of the inadequate notice—indeed, the wholly false and misleading notice—provided by a preliminary permit under this interpretation, and the resulting failure to give potential competing applicants and other interested parties the statutory notice to which they are entitled. This is no mere academic point, as illustrated by the present proceeding. We should bear in mind that Nez Perce was a project which had already been separately identified as a desirable project by the Corps of Engineers and endorsed by many of the preference agencies in this proceeding at the time PNPC applied for the preliminary permit. It is beyond belief that the preference agencies would at that time willingly have acquiesced in the award of a preliminary permit for the Nez Perce Project or for the HMS Project for which they would have been entitled to a preference. Under the circumstances it must be assumed that the pref-

erence agencies would have objected to an award of a preliminary permit under Project No. 2173 if they had been aware that it covered a high dam—that is, if they had been fairly placed on notice that Nez Perce of HMS was within the contemplation of the application as originally filed. Thus, to require specificity in the application, and thereupon to construe it as covering projects not specified, would result in depriving potential preference applicants of an opportunity to preserve the preference rights guaranteed by the statute. I cannot acquiesce in an interpretation of the statute so lacking in fairness.

If the majority's view prevails, permittees may tie up the development of great stretches of our nation's waterways for a decade or more by a single permit, to the exclusion of applicants accorded an express preference by Congress.

There is a second and independent reason why PNPC may not claim a priority for the HMS project; its preliminary permit and the priority incidental thereto were by operation of law terminated upon the denial of the first license application for the MS-PV project for which the permit was granted.

28811

A preliminary permit under the Federal Power Act is but a step in the licensing process, incidental and preliminary to the issuance or denial of a license. The permit is issued "for the sole purpose of maintaining priority of application for a license." (sec. 5) In legal terms, it merges in the license to which it is incidental. Once this sole purpose has been served by final Commission action on the license the preliminary permit ceases to exist.

The question of the maximum duration of the priority of a permit holder was raised early in the history of the Commission. Must the priority expire with the termina-

tion of the permit itself if the license application for the same project is still pending? This is the literal interpretation of section 5, which provides that the permit "shall be for the sole purpose of maintaining priority of application for a license * * * for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary * * *." However, since the total time for prosecuting an application for license may exceed three years from the date of the permit, this interpretation might afford the permit applicant little practical protection in some cases. Such considerations apparently moved the Chief Counsel for the Commission to advise the Commission in an opinion, formally approved by the Commission on April 30, 1923[8] that the priority attaches to the license application for which the permit was issued (if timely filed) and continues until the license is granted, denied or withdrawn. Under the opinion PNPC's permit expired six years ago. The majority chooses to stigmatize this as an "obscure opinion." The short answer is that the Commission adopted the opinion as its own and took the unusual step of publishing the opinion in its Third Annual Report to Congress. It was evidently regarded as a major exposition and clarification of the purposes of the statute.

The Chief Counsel's Opinion reads in part as follows:

> . . . The priority given by a preliminary permit attaches before use and before a definite application for use can be made, and subsists until application for license in proper form is filed in conformity with its requirements, or until the time which it grants for that purpose expires. When application for license, duly perfected, as required by the commission, is filed,

[8] Reported to Congress in the Commission's Third Annual Report to Congress (pp. 222-23).

the preliminary permit has served its purpose. The priority attaches to the application is withdrawn or is granted or rejected by the commission. It has no time limit, and can be lost only by withdrawal of the application having been

filed by the permittee, when entitled to priority, such priority attaches to the application and will continue for such time as may be used by the commission in granting or denying the application.

The twofold aspect of the Chief Counsel's opinion should be emphasized; first, that once the license application is filed pursuant to a permit, the permit merges with the license application; and second, that the priority may live beyond the term of the permit, but that its continued existence hinges upon the disposition of the license application. That is, once the license is denied or granted, or the application for license withdrawn, the priority has served its purpose and is terminated.

The Commission's order granting PNPC's preliminary permit provided that the permit was "for the sole purpose of maintaining priority of application for a license for Project No. 2173 [Mountain Sheep-Pleasant Valley]." By the Commission's standard of the past four decades PNPC's preliminary permit was terminated by the denial of its license application for Mountain Sheep-Pleasant Valley Project No. 2173. The only other reasonable interpretation of the language of section 5 is less favorable to PNPC and would terminate the priority with the expiration of the permit or no later than three years after filing, as was the practice prior to adoption of the 1923 Opinion by the Commission.

Another controlling question, which the majority opinion ignores, is whether PNPC's preliminary permit, re-

gardless of its scope, remained effective after its expiration date of March 31, 1958, to afford PNPC a priority with respect to the High Mountain Sheep Project. Section 5 of the Act provides that a preliminary permit maintains "priority of application for a license * * * for such a period * * * not exceeding a total of three years * * * as * * * may be necessary for making examinations and surveys, for preparing maps, plans, * * *," needed to support the license application. Section 9 expressly requires that "each applicant for a license hereunder shall submit to the Commission—such maps, plans, specifications, and estimates of cost as may be required *for a full understanding of the proposed project.*"

The 1923 opinion of its General Counsel which the Commission adopted held that "if a permittee within the time prescribed by his permit has filed an application for a license *in proper form and accompanied by the required data,* his priority will not expire with the expiration of the period of the permit but will continue for such time as may be used *by the Commission* in granting or denying the application." [emphasis supplied]

28813

On March 31, 1958—the last day before the preliminary permit for Mountain Sheep-Pleasant Valley expired—PNPC filed what purported to be a license application for the High Mountain Sheep Project (or perhaps even Nez Perce since the application left this possibility open).

The PNPC filing of March 31, 1958, was not complete as an application for a license. In fact, on April 23, 1958, the Commission's Secretary wrote PNPC to request that it supply a variety of basic information required to be submitted with a license application, observing "that additional information and data are required for an understanding of the proposed project including the proposed

project boundary." A copy of the Commission's letter of April 23, 1958, is attached hereto as Exhibit A.

The fact that PNPC's filing of March 31, 1958, for HMS did not contain sufficient information for an understanding of the project is not a mere technical deficiency in the circumstances of this case. A motion taking issue with PNPC's attempt to assert a priority for HMS or Nez Perce and moving to dismiss the application on the very ground of failure of the application to comply with the Commission's requirements was filed by the National Hells Canyon Association and the Northwest Public Power Association on April 18, 1958, a motion which the Commission has never acted upon. The motion correctly points out that the PNPC license application was incomplete and that by letter of March 11, 1958 (a copy of which is attached as Exhibit B hereto) PNPC itself had advised the Commission that it would need 10 more months in which to make a study of the High Mountain Sheep Project. Indeed it was not until after the expiration of the three-year period of the permit that PNPC made the studies to secure the information to complete its license applications for HMS. It was over 10 months later on February 23, 1959, and again on September 28, 1959, before the license application for the HMS project was amended to provide sufficient detail to proceed with the licensing process.

As the Commission pointed out in *Robert P. Wilson, et al.*, Opinion No. 364, dated October 10, 1962:

> The intent of the Federal Power Act is to have applicants act diligently and complete all the necessary investigations during the period of the preliminary permit.

In my judgment, the facts of this case make it clear that PNPC did not "complete the necessary investigations during the period of the permit." Its priority expired be-

fore PNPC obtained the data and filed the information that is a statutory requirement for perfecting a license application with the Commission.

The majority gives two other reasons in support of its position. First, it states that while the Commission's regulations require a precise rather than a generalized description of proposed projects in preliminary permits, the purpose is not to define the scope of the permit but merely to meet the requirements of section 24 of the Federal Power Act for reservation of proposed power sites from public entry. Second, that PNPC was led by actions of the Commission to believe that it would have been pointless and unnecessary to seek an amendment to its preliminary permit following the denial of the Mountain Sheep-Pleasant Valley license application. The reasoning of the majority is not persuasive on either of these counts.

The relevant regulation governing the filing of preliminary permits provides as follows:

§ 4.82 *Contents of Application*

Each application for preliminary permit shall • • • set forth in appropriate detail the following information in the order indicated:

• • •

(e) The location of the project, the region of its location designated by adjacent cities and towns, the name of the stream on which the proposed project will be located, and a statement of the extent to which commerce is carried thereon.

(f) The lands of the United States which will be affected by the proposed project.

(g) A general description of the project and the proposed scheme of development including an estimate

of the proposed installed capacity, and the average annual output.

The information requested is essential in determining whether a permit should be granted and to provide preference agencies with adequate notice of the scope of the application. I can read into these provisions no requirement that would have prevented PNPC from asking for a permit which would have included HMS or Nez Perce instead of limiting its request to the MS and PV sites. Certainly no such mandate can be found in such terms as "a general description of the project" and "the region of its location designated by adjacent cities and towns."

28815

In addition to the provisions quoted above, § 4.82 (k) of the Regulations requires that there be filed with the application as Exhibit H a "general map showing the nature of the proposed project, its principal features and their location, and the location of the project as a whole with reference to some well-known town or stream." Again, I am unable to find an unyielding requirement for a permit limited to the precise project description or designation which PNPC sought and received. Obviously the Commission would be free to allow an applicant to file a general description in the first instance to afford notice of the stretch of the river covered by the permit and later identify the project with greater specificity.[9]

The majority's assertion that the precise description of the project in this case relates only to the administration of § 24 of the Federal Power Act is far fetched indeed. It strains the imagination to accept the suggestion that the

[9] By the terms of the regulation a permit broader in scope could be accommodated since a proviso to § 4.82(k) states: "That any exhibit not incorporated as a part of the application shall be certified in conformity with § 131.4 of this chapter," (§ 131.4 being merely a certification form).

regulations were drafted exclusively to implement a routine function relating to land withdrawals, but serve no function in defining the scope of a priority which overcomes the rights of preference applicants that Congress took great pains to protect. Such an interpretation is in direct conflict with the overriding purpose of the Act to protect preference applicants and with the provisions of section 4(f) of the Act which require notice to States and municipalities and landowners in every county affected by a project before a permit is granted. That this reasoning will not hold up is borne out by the records of the Commission which show that no formal power site withdrawal was made in this proceeding, because the maps filed with the preliminary permit were not sufficiently accurate to serve as a basis for a formal withdrawal.[10] The specificity the majority insists is essential for power site withdrawals thus is lacking in this proceeding, and the asserted justification of the majority opinion vanishes.

28816

The majority's other reason to support its position is that PNPC was led by actions of this Commission to proceed as it did in 1958 without seeking an amendment of its preliminary permit, relying primarily upon an order of the Commission in the *Montana Power Co.* case.[11] This citation is not a Commission opinion but is a brief formal order innocent of any explanation germane to this case of why the Commission rejected the proposed amendment. The majority's heavy reliance upon *Montana Power* is a clear indication that there is no precedent for the decision in this case. There was no competing preference or pri-

[10] Considering the known deficiencies of topographic mapping in many sections of the country, we may safely assume that this defect is unlikely to be an isolated case.

[11] 17 FPC 834 (June 1957).

vate applicant then before the Commission in that proceeding, there was no priority issue, no need for a preliminary permit, and certainly no need for an amendment. Moreover the rejected permit application was for a project at precisely the same site the applicant was already exploring under an existing permit for a smaller dam.

If PNPC wished to base its course of action on Commission precedents it should have relied on our action in the Appalachian case,[12] a contested case decided after *Montana Power* on January 24, 1958, where an amendment to a preliminary permit was requested and granted, making changes comparable to those involved in the applicant's switch in the present proceeding from one project to another.

Judging by the Commission's customary standards, the public and competing license applicants were entitled to believe the PNPC's priority of application expired with our denial of the license application of Mountain Sheep-Pleasant Valley in 1958. At any rate the fate of PNPC's priority certainly was put in doubt following the denial of a license in 1958, and it was therefore PNPC's responsibility to ask for the Commission for clarification. This much PNPC itself appears to have recognized, for on June 27, 1958, before undertaking further investigations, it filed a motion for a declaratory order to ascertain the status of the permit and priority. This motion reflected PNPC's awareness of the position taken by the National Hells Canyon Association and Northwest Public Power Association that the preliminary permit for the Mountain Sheep-Pleasant Valley project did not survive the denial of the license. On September 28, 1959, after having made further investigations at its own risk prior to a Commission ruling on its motion, PNPC sought and obtained leave to withdraw its motion. In deliberately postponing decision on the con-

[12] 17 FPC 8, 19 FPC 169.

tinuing validity of the permit and the extent of its priority rights, if any, PNPC took a calculated risk which did not improve its legal position.

28817

While not reaching the issue of WPPSS's authority under state law to build the HMS or Nez Perce project, the majority indicates that there is a "serious question respecting the legal status of WPPSS." On this issue I need only say that in my opinion under section 9(b) of the Federal Power Act the authority of WPPSS is a matter for this Commission and not the courts to decide initially in the context of this license proceeding. I personally entertain no such doubts as my colleagues concerning the authority of WPPSS to build the project or its compliance with the requirements of section 9(b). *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U.S. 152 (1946); *PUD No. 1 of Pend Oreille County* v. *Federal Power Commission,* 308 F. 2nd 318 (CA DC 1962), *cert. den.* 372 U.S. 908 (1963), *reh. den.* 372 U.S. 956 (1963). See also *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320 (1958); *State of Washington Dept. of Game* v. *Federal Power Commission,* 207 F. 2nd 391 (9th Cir. 1953) *cert. den.,* 347 U.S. 936 (1954).

This case represents the first direct legal contest concerning the construction of section 7(a) in relationship to sections 4(f) and 5. In this benchmark decision the majority of the Commission proposes to interpret sections 5 and 7(a) in a manner which gives the priority of a preliminary permit great and elastic reach while narrowly circumscribing the scope of the preference clause. They have done violence to the statute on both scores.

.....

JOSEPH C. SWIDLER, *Chairman*

28818

EXHIBIT A

FEDERAL POWER COMMISSION
WASHINGTON 25, D. C.

Project No. 2243—Oregon and Idaho

April 23, 1958

Robert D. Yeomans, Secretary
Pacific Northwest Power Company
P. O. Drawer 1445
Spokane 10, Washington

Dear Mr. Yeomans:

Reference is made to the application for license for the Middle Snake River project No. 2243 filed with the Commission on March 31, 1958. The Commission staff has made a preliminary examination of the application and the exhibits filed and finds that additional information and data are required for an understanding of the proposed project, including the proposed project boundary.

It is noted that Exhibits H and I are to be submitted at a later date. These exhibits should be supplemented by your power study and power market study for the proposed project. In this connection it is requested that you furnish a copy of your transmission study.

It is also noted that Exhibit L drawings filed with the application show area geology, a geologic section, and logs of drill holes taken from "Interim Report No. 4, Mountain Sheep Dam, Portland District Corps of Engineers" dated December 22, 1947. It is requested that you furnish a geology report for the Middle Snake River project. It is also requested that you advise the Commission of your plan for foundation exploration and when the exploration will be completed and submitted as a supplement to your application.

In connection with any dam which you propose to construct, it is requested that you furnish design criteria and analysis and information as to your plans for additional analysis of the structure prior to construction.

With reference to the Exhibit N which you advise will be furnished later, it is requested that an estimate of cost with breakdown by major items for the Middle Snake River project be submitted as soon as possible. This should be supplemented by a detailed estimate of cost showing quantities and unit costs, together with other related construction costs. It is also requested that you submit your report on economic feasibility of the proposed Middle Snake River Project.

28819

It is requested that you advise as to the date when the data outlined above may be expected. Page 4 of the application states that applicant proposed to prepare and present appropriate information on alternative developments. Please advise as to when such information will be submitted.

A copy of this letter is being furnished to Smith, Gray, Hill & Rodgers, and Leighton & Sherline.

Very truly yours,

/s/ J. H. GUTRIDE
Secretary

28820

EXHIBIT B

PACIFIC NORTHWEST POWER COMPANY
P. O. DRAWER 1445
SPOKANE 10, WASHINGTON

March 11, 1958

Mr. Joseph H. Gutride, Secretary
Federal Power Commission
Washington 25, D. C.

Dear Sir:

Applicant has received a copy of letter from the attorney for the intervenors, dated March 4, 1958 and addressed to Commissioner William R. Connole. Attorney for intervenors misapprehends the relief requested. This letter is in reply thereto.

In assignment of error number 7, applicant refers to the Nez Perce and High Mountain Sheep projects, the latter of which is located below the mouth of the Imnaha and above the mouth of the Salmon. Preliminary investigation indicates that High Mountain Sheep with subsequent development of Lower Canyon would have approximately 500,000 acre feet more storage and about 150,000 kilowatts more installed capacity than Nez Perce. Under paragraph 3 of its prayer, applicant proposes to study the High Mountain Sheep project on a comparative basis with Nez Perce. Such a study is necessary before a final determination can be made as to the project which will constitute comprehensive development under the provisions of section 10(a) of the Federal Power Act.

Approximately ten months will be required to complete such study, depending upon the extent of drilling and engineering that may be necessary.

Specifically, in undertaking such comparative analysis, applicant will:

(a) Make geological investigations and studies;

(b) Do such engineering work, including preparation of maps, plans and specifications, as may be necessary, to determine problems of construction, quantities of earth and rock to be moved, materials and supplies required, type of structure to be built, and other determinations as may be relevant to make comparable estimate of cost;

(c) Determine the amount of storage usable for flood control and power production;

28821

(b) Carry out power routing studies and power capabilities;

(e) Determine flood control routing and effectiveness of flood control;

(f) Investigate the extent and cost of facilities required for the consideration of fishery resources and recreation opportunities.

Applicant will report the results of such study to the Commission and to all parties.

Applicant intends to prepare and file an amended application for a license for such project as appears as a result of such study to be economical and practical and meets the requirements of Section 10(a) of the Federal Power Act.

Applicant does not expect a license to be granted without a further hearing.

We are making the same distribution of this letter to the Commission as was made by counsel for intervenors, and are mailing copies to the parties as noted below.

Yours very truly,

PACIFIC NORTHWEST POWER COMPANY
/s/ JOHN J. BURKE
By JOHN J. BURKE, *President*

cc: Evelyn N. Cooper
Hilmer & Cooper
1025 Connecticut Avenue, N. W.
Washington 6, D. C.

T. J. Jones III, Esq.
Assistant Attorney General
State Capitol
Boise, Idaho

Robert Y. Thornton, Esq.
Attorney General
Salem, Oregon

John C. Mason, Esq.
Federal Power Commission
Washington, D. C.

28822

Project No. 2243
PACIFIC NORTHWEST POWER COMPANY

Project No. 2273
WASHINGTON PUBLIC POWER SUPPLY SYSTEM

(Issued February 5, 1964)

BLACK, Commissioner, *dissenting:*

I concur with Chairman Swidler's dissent, but I did not participate in the Commission's decision on the selection

of the site and, therefore, express no opinion as to the relative superiority of the Nez Perce or proposed High Mountain Sheep developments.

DAVID S. BLACK
Commissioner

28823

[Docketed March 6, 1964]

BEFORE THE FEDERAL POWER COMMISSION

In the Matter of

PACIFIC NORTHWEST POWER COMPANY Project No. 2243

and

WASHINGTON PUBLIC POWER SUPPLY SYSTEM Project No. 2273

Application for Stay and Application for Rehearing

• • • • • • • • • • •

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That PNPC's initial HMS application was incomplete is amply evidenced by PNPC's March 11, 1958 letter to FPC, saying it would need 10 more months to study HMS; by the Commission's letter of April 23, 1958, requesting additional information of PNPC; by the substantiality of the amendments submitted February 25 and September 23, 1959; and by the fact that the Commission did not deem the application to be complete enough "for a full understanding of the proposed project" to warrant public notice until after the September 23, 1959 amendment was filed (18 months after the original incomplete HMS application was

filed) (see Part II, B, *supra*). As already noted, the original HMS application was filed the last day of the original 3 year permit term and no prior studies had been made of the HMS project below the Imnaha, all such studies having been made limited to the area *above* the Imnaha. Consequently, on March 31, 1958, PNPC lacked the data essential for a complete HMS license application. These facts leave no doubt as to the meritoriousness of WPPSS's contention. As the minority said, "the facts of this case makes it clear that PNPC did not complete all the necessary investigation during the period of the permit" (p. 15).

WPPSS is the successor in interest to those interveners who moved to dismiss PNPC's application because of incompleteness on April 18, 1958 and who subsequently withdrew their intervention on the ground that their interest would be adequately represented by WPPSS. Their motion has never been acted upon by Commission (Min. Op., p. 15). In these circumstances, the majority's conclusion as to WPPSS's untimeliness is unwarranted.

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BEFORE THE FEDERAL POWER COMMISSION

In the Matter of

PACIFIC NORTHWEST POWER COMPANY Project No. 2243

WASHINGTON PUBLIC POWER SUPPLY SYSTEM Project No. 2273

Application of Stewart L. Udall, Secretary of the Interior, for Rehearing and Petition to Reopen Proceeding for Reconsideration and for a Stay

• • • • • • • • • • •

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Stewart L. Udall, Secretary of the Interior, Intervenor, now comes and avers that he is aggrieved by the Opinion

and Order dated February 5, 1964, granting license to Pacific Northwest Power Company, for High Mountain Sheep Project. Pursuant to Section 1.33 and 1.34 of the Commission's Rules of Practice and Procedure and Section 313 of the Federal Power Act (16 U.S.C. 825(1)) Intervenor applies for a rehearing in this proceeding, and enters this petition that the proceeding herein be reopened for the purpose of enabling the Intervenor to submit evidence necessary in this proceeding and applies for a stay of said Order.

I

In addition to the more particular grounds hereinafter set forth, the Commission erred in finding and ordering that a license for the High Mountain Sheep Project should be issued to the Pacific Northwest Power Company; the Commission's Order is contrary to law and not supported by substantial evidence, or adequate findings.

Underlying this basic exception and the exceptions hereinafter set forth are considerations which can be advantageously summarized at the outset.

There is no present regional need for the power to be generated by the High Mountain Sheep project which would balance the probable

damage to the fish resource. The Snake River salmon run has been adversely affected by the construction of the Idaho Power Company dams at Brownlee and Oxbow. Construction of an additional high dam on the Snake can only aggravate disastrously an already dangerous situation. It may destroy the fish run. There is absolutely no need for that destruction.

Inadequate as this record is in regard to loads and resources (the figures were prepared in 1959) it is very clear that the Northwest is surplus in power until 1972. De-

velopments since the record was closed make it very probable that the regional surplus will continue well beyond that date.

The Federal Power Act contemplates the issuance of licenses to meet present needs. The license procedure is not designed to allow applicants to speculate in future needs or to allow an applicant to tie up development of a reach of the river in advance of his or the region's needs.

The Commission gave this license to the Pacific Northwest Power Company because its member companies were not preference agencies and so could not be assured of a power supply in the event of shortage of Federal power. Reasoning based on this premise should have led to a recommendation to Congress for Federal construction of High Mountain Sheep. Certainly the proper conclusion is not the anomalous one by which the Commission gives private power companies a preference for a license because Congress has given public agencies a preference for Federal power.

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The Commission rejected a recommendation to Congress of Federal construction under Section 7(b) on the subjective opinion that Congress would probably not act favorably on the recommendation. This speculation completely defeats the purpose of 7(b). Congress expected the Commission to exercise an expertise in the area of resource development involving hydroelectric projects. It is not likely that Congress expected the Commission to have any special expertise regarding the political probabilities of Congressional action.

The Commission's opinion contains a most extraordinary statement: "Cost savings to consumers at the expense of the taxpayers of the country at large may, of course, fol-

low from Federal development as a result of low cost financing and absence of tax obligations." P. 37. Federal construction is not some sort of immoral scheme. It represents a decision by the United States to develop a public resource in a way that will maximize the public good. We submit that if the Commission feels strongly about the philosophy it here expresses, it should recommend to Congress that Congress repeal Section 7(b) of the Federal Power Act. Meanwhile, so long as it is part of the Act, we would hope that the Commission would make recommendations for Federal construction where appropriate. We believe it is appropriate here.

It must be remembered that we are here concerned about a project site which is a public resource. Its value arises from the river that

flows through it, the canyon walls that will anchor the dam, and the possibility of using that physical opportunity for public purposes of which power may not even be primary in importance. Those purposes include flood control, fisheries, navigation, recreation, water supply and others.

This site is not that of a simple run-of-the-river power generation plant. It must be developed not only to take present advantage of other public purposes, but in such manner as to allow future generations to use this multipurpose resource in ways not now predictable. The term of a private license is 50 years. Long before that 50 years has expired, the primary value of this national resource will be other than power. Public ownership will provide the flexibility that will allow accommodation to such future needs. Private licensing, even under the continued supervision of a vigilant Commission, can only introduce considerations of private property rights and equities that will make such accommodation difficult.

In regard to power development itself, private licensing here is no adequate substitute for Federal development. Every dam existing, under construction or authorized, downstream of the proposed project, is Federal. The nine projects will represent upon completion of construction a Federal investment of $1,673,100,000. These are all run-of-the-river dams whose generation capability is directly dependent upon the storage that will be provided at the proposed project. It

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is almost inconceivable that any situation anywhere could argue more strongly for a recommendation of Federal construction under Section 7(b).

The record regarding coordination is incomplete. There is sufficient testimony to indicate—if benefits to Little Goose, Lower Granite and Asotin, are projected on a basis comparable to that computed for the other six downstream projects—that downstream benefits from full coordination will total 290 mw of prime power. Under non-Federal licensing these coordination benefits must be obtained by voluntary agreement. Any thought that such an agreement will be easily obtained is an illusion. With the best of good will, that may not be possible.

The coordination benefits so speculative if this project is privately licensed can be assured if this project is Federally constructed and operated.

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II

The Commission erred in failing to conclude that Section 7(b) of the Federal Power Act requires the denial of the license applications herein, and in failing to determine that the water resource involved in this proceeding should be developed by the United States at an appropriate time.

Section 7(b) of the Act (16 U.S.C. 800(b) reads as follows:

> Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

The Commission, after citing the above statute, concluded as follows:

> We agree with our staff and the Examiner that the record supports no reason why Federal development should be superior to development by Pacific Northwest Power Company, and we see no reason why we should withhold a license and recommend that the United States build the project.
>
> While we have extensive material before us on the position of the Secretary of the Interior, there is no evidence in the record presented by him to support his position . . . FPC Order of February 5, 1964, p. 36.

Contrary to the Commission's conclusion, the record, although inadequate in other respects, compels the conclusion that Federal development is superior to non-Federal development.

The Commission has failed to meet the first issue posed by Section 7(b); i.e., whether the projects applied for substantially

affect Federal development. Here the record discloses that both parties and the Staff unanimously agreed that either

project will have a significant effect upon Federal development.

Section 7 of the original Water Power Act of 1920 contained the following language:

> That whenever, in the judgment of the Commission, the development of any project should be undertaken by the United States, the Commission shall not approve any application for *such project* by any citizen, association, corporation, state, or municipality.... (emphasis supplied).

By the Act of August 26, 1935 (49 Stat. 842), Section 7 was amended by substituting the phrase, "development of any water resources," for the more restrictive phrase, "development of any project." Substituted for the original proscription of Commission approval of "any application for such project" was the present language, which forbids the Commission from approving "any application for any project affecting such development."

It is clear that under this amendment the Commission is proscribed from licensing a project which would affect existing or prospective Federal development of a water resource. Thus, the proscription is expanded to include projects which may not originally be a part of existing or prospective Federal development, so long as those projects *affect* that development. This is the clear meaning of Congress' words. Had it meant only to prevent the Commission from granting a license for a project already contemplated or authorized by Congress, the amendment of Section 7(b) would be utterly meaningless.

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Virginia Electric Power Company, which prevailed in its license application for the Roanoke Rapids site, contended that the phrase "affecting such development" in Section 7(b) means "physically affecting such develop-

ment'' It argued that since Roanoke Rapids was the farthest downstream of the projects in the comprehensive plan, it would not physically affect Federal projects, and, therefore, did not come under the provisions of Section 7(b). And this, at least by implication, was the holding of the Court. *United States Ex rel. Chapman* v. *Federal Power Commission,* 345 U.S. 153 (1953). Nevertheless, the Commission herein ignores this issue and proceeds as though the language of the original 1920 Act were still in effect.

Under Section 7(b), as amended, the expression of a judgment by the Commission (that development of water resources should be undertaken by the United States) and the effect (of a proposed project on such development) are conditions precedent to the prohibition against approval of the application. Since every dam site on the Columbia and Snake Rivers below High Mountain Sheep, from Tidewater through Asotin, has been, is being and will be developed by the United States, Congress has already determined that said Reach of the Columbia and Snake Rivers be developed by the United States. Thus, as to the water resource through Asotin, the ''judgment'' of the Commission has been replaced by the judgment of Congress.

The actual development of the area pursuant to authorization by Congress indicates that the Commission should accept that authorization as its own judgment under Section 7(b).

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Hence, as to the water resource from Bonneville Dam through Asotin, the first of the two section 7(b) conditions precedent exists. The Commission must then determine whether the second condition precedent exists—whether the licensing of the High Mountain Sheep would substantially affect existing Federal development.

All parties herein agree that both proposed projects will have a considerable physical effect upon the generation capabilities of the downstream Federal projects. (See, e.g., PNPC Exs. 17, 81, 82; WPPSS Exs. 47, 53, 293; Jt. Ex.) All parties also agree that in order to maximize power benefits to the entire region either project must be ultimately and totally coordinated or integrated in its operation with all of the projects in the entire Columbia System and Basin. (See WPPSS Exhibits, above, and testimony of Gallup; see Tr. 146)

However, the estimates of all parties are incomplete. Excluded from everyone's computation of downstream benefits from ultimate integrated or coordinated operation are the benefits that would accrue to Little Goose, Lower Granite and Asotin, the first of which has received an appropriation and the last two of which are presently authorized. According to figures extrapolated by the Bonneville Power Administration on the basis of the studies in the record the benefits to these three dams from a totally integrated High Mountain Sheep would be 115 mw. When this is added to the benefits computed by the parties for the other six downstream projects, 171 mw, PNPC Ex. 17, to 180 mw, Jt. Ex., Table 1, Sheet 1), a total downstream benefit of from 286 mw

to 295 mw would be realized from ultimate integrated or coordinated operation of High Mountain Sheep. (These figures represent nominal prime energy over the critical hydro period.) The maximum downstream benefits that would be realized from ultimate integrated or coordinated operation of High Mountain Sheep, therefore, will be more than one-third of the total at-site generation.

The benefits shown above presuppose coordination of High Mountain Sheep not only with the projects down-

stream, but also with the large Federal storage dams on the Columbia, namely, Grand Coulee, Albeni Falls and Hungry Horse.

The record, then, independent of any argument by the Secretary of the Interior, conclusively demonstrates the considerable effect that the proposed projects will have upon the Federal development downstream and system-wide. We submit, therefore, that under the provisions of Section 7(b) of the Federal Power Act the Commission is prohibited from granting a license to either applicant.

The Commission's argument that numerous non-Federal licenses have been granted in the Columbia Basin does not meet the issue. It ignores the 1935 amendment of the Federal Power Act. None of the non-Federal dams mentioned by the Commission on page 36 of its opinion, with one exception, are storage dams. Priest Rapids, Wanapum, Rock Island, Rocky Reach, Wells, Oxbow and Hells Canyon are all run-of-the river dams with limited pondage. They have no significant physical effect upon Federal development, downstream or system-wide. Only Brownlee has a significant physical effect upon Federal development. The reason for this is that the Brownlee is a storage dam.

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In spite of the dismal history of Article 39 of the Brownlee license (the Coordination Provision), the Commission made no attempt in the High Mountain Sheep hearings to resolve the problem posed by the licensing of Brownlee, a non-Federal project, above Federal development. It is precisely this problem that is posed by the applications herein. It is this problem that 7(b) was designed to prevent.

The Commission seems to believe that the imposition of a condition in a license can cure all problems created by the effect of a non-Federal project of Federal development.

The condition it has inserted cures nothing. It simply substitutes continuing operational control by the Federal Power Commission for Federal development. But such a solution is contrary to the plain meaning of the language of 7(b) and the intent of the Federal Power Act.

III

The Commission erred in failing to make proper findings, supported by substantial evidence, as to a comparison between Federal and non-Federal development in order to determine, as required by Section 7(b) of the Federal Power Act (16 U.S.C. 800(b)) whether non-Federal development will provide benefits equivalent to Federal development.

The Commission is first required by Section 7(b) to determine whether non-Federal development will effectuate or achieve the public benefits that will be made available by Federal development. This is the interpretation of Section 7(b) by the Examiner herein, the Commission herein, *National Hells Canyon* v. *Federal Power Commission,* 237 F. 2d 777 (D.C. Cir.) Cert. Den. 353 U.S. 924 (1956);

and *United States Ex. rel. Chapman* v. *Federal Power Commission,* 345 U.S. 153 (1953). As stated by the Examiner herein at page 86 of his Decision:

> When is a recommendation for development by the United States under Section 7(b) (16 U.S.C. 800(b)) justified? The plain meaning of Section 7(b), its interpretation by the courts, and application by the Commission, clearly suggest the answer—when licensing non-Federal development will not effectuate or achieve the public benefits that will be made available by Federal development. These benefits cover optimum development of the resource and include power . . .

(*National Hells Canyon Association* v. *Federal Power Commission* . . . and *United States ex rel. Chapman* v. *Federal Power Commission* . . .)

Nevertheless neither the Examiner nor the Commission actually did recognize this duty in deciding the case. The Examiner stated at page 11 of his Decision:

> The basic issues in this proceeding are which of the proposed projects is best adapted to a comprehensive plan of development for all public purposes as required by Section 10(a) of the Act; which, if any, should be licensed, and to whom should the license be issued. This in turn depends upon a wide range of . . . considerations . . . including the safety and stability of the proposed dam sites and project structures, the impact of the proposed project on the fishery resource, comparative economic and financial feasibility, the needs and market for the power output of the proposed projects, the relative qualifications and legal status of the competing applicants, and an overall comparison of the proposed plans and projects in terms of design, costs, benefits, and other relevant factors.

As for Federal development, the Examiner regarded it as "*an additional issue raised by the Secretary of the Interior's letter* . . . (Ex. Dec., p. 11) and the Commission stated at page 21 of its Opinion, "*Finally, we have before us the issues raised by the Secretary of the Interior in his request that Federal construction be recommended.*" (Emphasis added.)

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The letter to which both refer was written on June 28, 1962, nine months after the hearings were closed.

Even if it be contended that the Secretary of the Interior should have intervened and offered evidence at an earlier

stage in the proceeding, the Commission should fulfill its independent responsibility under Section 7(b) of the Act.

The Commission erred in not determining the power benefits that would accrue to the dams downstream and to the region from non-Federal development and those that would accrue from Federal development.

That the Commission never regarded Federal development as an issue until after the hearings terminated is not only apparent from its own statements, but also from the record. As stated above, both parties presented figures representing downstream benefits from "*ultimate integrated*" or coordinated operation. Although the applicants agreed, as does the Commission (Opinion, p. 38), that completely coordinated operation is absolutely necessary in maximizing power benefits, there was considerable doubt whether such operation could be achieved by voluntary agreement. (See WPPSS initial brief, pp. 172-77; Tr. 647; PNPC Reply Brief, pp. 102-106; Tr. 146, 1761.)

Although the realization of ultimately 290 mw ($5,075,000 worth of firm power annually at the present Bonneville Power Administration "postage stamp" rate) could be achieved downstream by full coordination, no investigation was made by the Commission to determine precisely how this was to be accomplished, when it was to be accomplished,

and even whether it could be accomplished. There is no evidence as to the degree of coordination and, therefore, the amount of power benefits, that can actually be achieved from non-Federal development. Alternatively, no attempt was made by the Examiner or the staff to determnie the amount of actual power benefits the applicants would in fact produce without coordination.

All parties concede that hydraulic and electrical coordination of either project with the Federal projects downstream is but a part of the picture. In order to achieve maximum coordination with the downstream projects, four of which are directly hydraulically affected by Columbia River storage and all of which are and will be coordinated with the entire Federal system, system-wide coordination is necessary.

The importance of the tremendous proportion of effective storage owned and operated by the United States elsewhere in the system cannot be stressed too strongly. Due to a variety of circumstances—variance in load, variance in streamflow, varying flood control, irrigation and navigation releases—it is necessary, in order to obtain maximum utilization of either High Mountain Sheep or Nez Perce, that they be operated in complete coordination with the other storage projects elsewhere in the system.

Moreover, either of these projects would affect, in conjunction with Grand Coulee, Albeni Falls and Hungry Horse, comprising approximately 75 percent of the system, the four Federal dams downstream on the Columbia, namely, Bonneville, The Dalles, John Day and McNary. As loads vary in various parts of the basin, as natural flow

varies and as the needs for flood control, irrigation and navigation releases vary, so, therefore, must the operation of all of the storage projects in the system and the basin vary in order to accommodate these changes while conserving as much water as possible and maximizing firm power.

The conclusion became inescapable early in the hearings that only through complete integration or coordination with the Federal system could maximum power benefits be realized from either Nez Perce or High Mountain Sheep. Due to the admitted limited ability by both applicants to

achieve this (see WPPSS Initial Brief, pp. 172-177; PNPC Reply Brief, pp. 102-106; Tr. 146, 642, 1761), it became apparent that the only effective guarantee to the public that either of these projects would produce maximum power benefits to the region would be Federal development. In addition to its ownership of all of the downstream projects and 75 percent of system storage, the United States through the Bonneville Power Administration is obligated by Congress and the Executive Branch to coordinate its own projects in order to fully maximize the power benefits therefrom (Bonneville Project Act, 50 Stat. 731; River and Harbor Act of August 30, 1935, 49 Stat. 1028; Executive Orders 8526 and 8455; Interior Department Order 2860, 27 F.R. 591, as amended 28 F.R. 5273).

Nevertheless, despite the fact that it was conceded expressly (Tr. 647-8, WPPSS Initial Brief, pp. 175-6, WPPSS Exs. 37, 293, PNPC Exs. 81, 82, Jt. Ex.) and implicitly (see above Tr. quotations from

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PNPC and WPPSS witnesses), that full coordination with the Federal projects downstream and system-wide is necessary to achieve maximum power benefits for the region, no attempt was made by the Examiner or staff to determine whether those problems posed by non-Federal development would be solved by Federal development. No attempt was made to determine the power benefits from Federal development. No attempt was made to compare these power benefits with the actual power benefits of non-Federal development.

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IV.

The Commission erred in concluding, without substantial evidence, that the full power benefits of the High Mountain

Sheep Project will be realized by the issuance of a license conditioned upon a coordination provision; said coordination provision is arbitrary in that it is unsupported by any evidence; and said coordination provision is arbitrary in that it is so vague and ambiguous as to be meaningless; said coordination provision is contrary to law in that it violates Section 10(f) of the Federal Power Act and gives to the Commission powers in excess of those granted under the Federal Power Act.

The Commission allowed the hearings to terminate without attempting to ascertain the nature of coordination problems and whether they would or could be solved by a license provision or by Federal development. Instead, the Commission attempts to cure the record and solve the problem by stating in its opinion:

> To implement this coordination and operation we shall use a provision substantially as found in the Wells Project license as requested by both PNPC and the staff, to provide that the licensee shall operate the project in complete coordination with the Northwest power pool. We have continuing jurisdiction and will insist that this be done. (p. 38)

The coordination provision reads as follows:

> The licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other power systems and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the licensee as the Commission may order. FPC Form L-6, Article 14.

A similar provision is in the Wells license. But the Wells Project is a run-of-the-river project, the operation of which has little,

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if any, effect upon coordinated operation. The Commission has had absolutely no experience with this provision in its application to a storage project.

How will that provision control the operation of a storage reservoir? Is it intended that in a case such as Wells the licensee must share some of the downstream power benefits derived from use of Grand Coulee storage with the Federal Government? The answer must be "Yes" because these are the only benefits of such coordination. Wells confers no benefits whatever on downstream dams. Benefits of coordination with upstream storage are received by Wells itself. Is it intended that the part of the benefits received by Wells from upstream Federal storage are to be given to the United States in addition to the Section 10(f) payments? Or are they to be in lieu of Section 10(f) payments?

Conversely, does the application of such a provision to a non-Federal storage project above Federal downstream run-of-the-river dams mean that the United States shares its downstream benefits? But the Commission cannot order the United States to make payments for downstream benefits. Or is the Commission attempting to amend Section 10(f) by this provision? Is it the intent of the hearings proposed under Article 14 to issue an order requiring the Federal Government to surrender a share of the power generated at its downstream Federal plants to the applicant as consideration for the

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coordination of its facilities in such a way to afford downstream benefits?

The only way that coordination could be achieved under the proposed provision would be for the Commission to assert jurisdiction over the operation of the Federal power system. Is this intended?

If the United States refuses to accede to the assertion of jurisdiction by the Commission over its power generation, is it the intent of the Commission to authorize the licensee to operate its plants as isolated plants?

If coordination were achieved, does the Commission also assert jurisdiction over the at-site diversity benefits of applicant, and does it intend to order applicant to share certain of these diversity benefits to the United States?

And what ligitimacy does the Pacific Northwest Power Company's espousal confer upon the provision? In spite of the difficulties posed by the ambiguities of Article 39 of the Brownlee license, the Pacific Northwest Power Company stated that it favored the Wells provision because "both (the provisions of Brownlee and Wells) represent essentially the same substantive obligations on the part of the Licensee." (Pacific Northwest Power Company's Reply to Exceptions of the Secretary, p. 33.) What "substantive obligations?" The meaning of the provision in the Brownlee license of the Idaho Power Company is an absolute mystery. The Company itself has now applied to the Commission for clarification of this very provision. In any

event, the Commission should take official notice that under Article 39 the licensee in Project No. 1971 has not reached any agreement on coordination with the United States Columbia River Power System, by far the largest system on the Columbia River, although 17 percent of the license period has elapsed.

The Staff's recommendation of this provision is particularly baffling. In Docket No. E-6384 it has consistently proposed miniscule headwater benefit payments to the United States, based on actual releases rather than increased critical period energy capability, for the specific reason that coordination with the Northwest Power Pool without a written contract provided no assurance of storage releases. Since the proposed Article 14 provides only for coordination with the Northwest Power Pool, "a voluntary arrangement," and since the Commission has no jurisdiction to order the Bonneville Power Administration and other utilities to include High Mountain Sheep in an agreement among themselves, what assurance of storage releases to the Federal dams downstream is provided by the Commission's coordination provision?

Examination of Article 14 discloses a variety of built-in problems. Coordination cannot be achieved by unilateral action. The Commission has no legal authority to prescribe for the Federal Government the methods or method of operating its projects. The Department of the Interior must operate its dams in accordance with standards imposed by Congress. It is entirely possible that the

Secretary may not agree with the Commission in regard to a plan of operation. Surely Article 14 cannot mean that, since the Department's projects are such a large part of the system, the Commission and Licensee must, in the event of a disagreement, conform to the wishes of the Secretary of the Interior?

The United States is but one of a number of project owners in the Basin who would be affected by and whose cooperation would be essential in arriving at an effective method of coordinating High Mountain Sheep. Does the Commission seek by Article 14 in this license to acquire

jurisdiction to prescribe for all other project owners on the river system the method by which they shall operate their plants? In order to be effective, it must. Does the Commission intend to modify each existing license in the Basin by adding this provision to said licenses? And does the Commission have the power so to do? (See e.g., Sections 6 and 28 of the Federal Power Act.)

Does the Commission intend to act in the future as the River Master of the Columbia Basin? Is it willing and does it have the staff to dictate a method of operation to all project owners in the event agreement cannot be reached? Does it intend to supervise the actual regulations and operation of the dams?

Due to the insoluble problems, factual and legal, that coordination raises, the Commission cannot cure the deficiencies of non-Federal development. For this reason we petition for reopening of the record in order to allow the introduction of evidence regarding river operations

without coordination and under varying types, modes, and degrees of coordination.

While we do not believe that any coordination provision can assure complete coordination with the "affected parties on the river" (Opinion, p. 38), we suggest that the Commission might consider the following provision as that which would assure the maximum coordination obtainable under the existing record in this case.

> The Licensee shall enter into a coordination agreement with the Federal agencies responsible for marketing power from the Federal projects in the Pacific Northwest so as to optimize regional power production consistent with other water resource development and

purposes. Such coordination agreement shall include the following:

(1) Licensee shall be entitled only to secondary energy produced at site and to the firm load carrying capability which would be produced at-site during the critical stream-flow period for the coordinated system, assuming full storage releases from the project in the coordinated system.

(2) Energy shall be exchanged between Licensee's project and the Federal marketing agency to maintain this firm load carrying capability of Licensee's project and of the projects of the Federal marketing agency.

(3) Water releases shall be scheduled from High Mountain Sheep project in accordance with the power needs of the region.

(4) Transmission facilities shall be provided as needed for exchanging power as contemplated above.

(5) Energy shall be stored in the High Mountain Sheep project at the request of the Federal marketing agency whenever storage space is available in excess of the needs of the Licensees.

An agreement shall be completed within one year after acceptance of license by the Licensee and prior to the commencement of construction.

28938

V

The Commission erred in finding that the High Mountain Sheep Project constructed by Pacific Northwest Power Company at this time would be best adapted to the comprehensive development of the waterway or waterways for the purposes set forth in Section 10(a) of the Federal Power Act.

The nature of existing and proposed development of the water resources of the Columbia River System, and the nature and magnitude of this project, require that the term "waterway or waterways" as used in Section 10(a) of the Federal Power Act must be construed as meaning the entire Columbia River System in this instance and not just the middle reach of the Snake River or even the entire Snake River. In the comprehensive planning and development of the Columbia River System for multiple purposes the entire river system has been treated as a unit. The High Mountain Sheep project is not a simple single-purpose run-of-the-river power generating plant. The effect of the High Mountain Sheep Project on power, on flood control, on fisheries, on navigation, as well as on other purposes, extends to the entire Columbia River System and must be considered in light of the comprehensive plans for development of the entire system.

The finding required under Section 10(a) also involves a consideration of which project is going to be constructed, who will construct it, and when it should be constructed. The Commission had before it two mutually exclusive proposed non-Federal projects and a recommendation for Federal construction of one of these projects.

The lack of substantial evidence to support the Commission's finding on these three important points is illustrated by the

following statement of the Commission:

> "... we think that the best way of exercising our responsibilities under Section 10(a) is to determine whether a grant of either the Nez Perce or High Mountain Sheep projects at this time would, *the important time factor considered,* preclude a superior develop-

ment of the rivers involved." (Opn. p. 9) (emphasis added)

Throughout the Opinion reference is made to the time factor as being a significant basis for the conclusions the Commission reached on which project is best adapted to comprehensive development. But the importance attached to the time factor was based upon stale and obsolete evidence with respect to loads and resources, not only of the applicant, but of the entire Pacific Northwest region. Thus the Commission's entire findings under Section 10(a) and even under Section 7(b) are grounded not upon substantial evidence, but upon generalizations made necessary to replace the detailed studies which had become obsolete and erroneous since the hearing.

Actually, the evidence in the record, coupled with that of which the Commission might take administrative notice, e.g. new projects, such as Hanford, would lead to the decision to dismiss the applications because there is no present need for the power.

A. *The Commission's finding that the proposed project is best adapted to the comprehensive development of the waterway is not supported by substantial evidence insofar as it pertains to flood control aspects of the project and of the comprehensive plan.*

Adequate flood control storage on the middle reach of the Snake River is admittedly a matter of major significance in determining the proper development of that portion of the waterway. The Commission found that the High Mountain Sheep project would provide only

2,250,000 acre-feet of usable storage for flood control compared with 5,015,000 acre-feet at Nez Perce. It added:

"... However, this preference is somewhat diminished in value by the fact that the High Mountain Sheep plan of development would eventually also include 3,265,000 acre-feet of storage for the lower canyon development on the Salmon ..." (Op. p. 7)

Nevertheless it concedes that:

"... there is no immediate proposal for the construction of projects incident to either plan other than the High Mountain Sheep and Nez Perce Projects." (Op. p. 9)

The Commission has not made any finding as to whether licensing the High Mountain Sheep Project to Pacific Northwest Power Company would be likely to bring about development of the lower Canyon Project or not. It has not made any finding as to whether construction of Lower Canyon is desirable or consistent with comprehensive development of the Colorado River System.

In Article 51 the Commission provides for operation of the project in the interests of flood control and provides that controlled outflows will be subject to flood control requirements as determined by the Corps of Engineers "with due regard for the requirements for the optimum multiple-purpose operations of the project." Also that the daily outflows will be determined "with due consideration given to all purposes of the project." This language should be considered, however, in conjunction with statements of Mr. Kinsey Robinson, Chairman of the Board of Pacific Northwest Power Company, who testified that Pacific Northwest Power Company would operate the project for flood

control in accordance with arrangements with the Corps of Engineers, but that because this operation would result in

a loss of power capacity, he would expect that the Corps would utilize the flood control available from other projects first. Those other projects are the great Federal storage projects. In other words, he expects that High Mountain Sheep will be operated for flood control so as to minimize the burden on this privately owned reservoir and so as to maximize the burden on the Federal projects.

B. *The Commission's finding of best adaptability of the proposed project is not supported by substantial evidence with respect to the effect of the project on the fishery resources of the Columbia River System.*

The Commission in its opinion has emphasized both the importance of conserving the fisheries resource of the area and of the dangers to it posed by the proposed projects. (Pages 14-20 of the Opinion). In its discussion of the problem, the Commission concedes that "The fish facilities proposed for both upstream and downstream migrants offer a number of hazards." (Op. p. 16). It adds that many of the matters are "in the present state of our knowledge of fish habits . . . highly controversial, and are not in our opinion clearly resolved in the record." (Op. p. 18). The opinion points out "that there is abundant evidence, however, that a reservoir, such as the one that would be formed by the Nez Perce Dam (or High Mountain Sheep) would provide many risks to the upstream migrants" and, further, that "In the present state of the art it is not possible to build facilities for fish passage with any assurance that they will be effective." (Op. p. 18).

After making these observations, the Commission resolves the problem by selecting the dam (High Mountain Sheep) which as between the two projects is considered the less injurious to the resource. The award of a license to Pacific Northwest Power Company for High Mountain

Sheep is justified as necessary to preserve the salmon runs in the Salmon River. The fish runs on the Snake River and in the Imnaha River are for all practical purposes written off as a loss. The explicit premise for this decision is that one or the other of these projects must be licensed now. This is simply not so. There is no present regional need for power that would be generated at the High Mountain Sheep project.

The record in this case utilized studies of the loads and resources of the Northwest area that were both inadequate and out-of-date. They were prepared in the fall and winter of 1959. Even so, the record indicates, and any determination based on current load and resource studies would find that there is no present need for this project. Without the need there is no reason for licensing a project that can only further hurt a fishery resource—that on the Snake—already almost destroyed by a similar high dam.

Delay in construction will allow much needed time to work out solutions to fish transit problems. The Commission itself has independently indicated its concern about such solutions and is currently conducting an ancillary proceeding in Docket No. 1971, the Hells Canyon license. The Commission is also aware of progress in studies being conducted by the Department and others. There is

hope of solutions if time is made available.

It is possible that neither the High Mountain Sheep site nor the Nez Perce site is the best for mid-Snake development. In its review of the Columbia River and Tributaries in 1961 the Corps pointed out alternative sites on the Snake River for power development that would preserve this important fish run. (Vol. I., Columbia River and Tributaries, March 31, 1961) This Department, in commenting on the Corps report in March 1962 emphasized

this point. (Ltr.—Secretary of Interior to Secretary of the Army, March 14, 1962) To license High Mountain Sheep at this time without taking into account the power resources that can be developed at alternative sights as such power may be needed in the region is not in accord with the Congressional directive contained in Section 10(a) of the Federal Power Act. It is as important to protect the fish run above High Mountain Sheep as it is to protect it below High Mountain Sheep. Construction of an unneeded power facility at the expense of a great fishery resource cannot be in accord with comprehensive planning.

In this connection, it should be noted that the Commission included the possible Lower Canyon project on the Salmon in calculating power benefits of a High Mountain Sheep project, coupled with Lower Canyon, as compared to Nez Perce, but excluded Lower Canyon in deciding that High Mountain Sheep was better for the fish than was Nez Perce. A Lower Canyon project would block the Salmon River. It is not the subject of a present application. Its eventual construction is most conjectural. Predictably, it will be opposed most strongly by the Department. Meanwhile, a High Mountain Sheep license should not be issued which in part is justified by a problematic development at Lower Canyon.

28944

VI.

The Commission erred in failing to find, as a conclusion of law, or mixed law and fact, that matters which have developed since the record was closed have made all evidence in the record pertaining to power needs untrustworthy and misleading in character, so that such evidence has ceased to be substantial evidence upon which reliable and lawful findings of fact can be based.

The discussion of power resources and requirements at pages 31-34 of the Commission's opinion betrays the fact that this entire body of findings is not based on substantial evidence. The findings are general conclusions and avoid any table of figures against which they can be tested. This is in marked contrast to the Examiner's opinion of October 8, 1962. The Examiner, at pages 33-36, set out the estimates in megawatts of loads and resources in the Pacific Northwest. These tables were made in 1959 as estimates for 1960.

Between October 1962 and February 5, 1964, the 1960 forecasts had become so stale that it was no longer possible to recite specific estimates in the body of the opinion. Instead the Commission resorted to generalities. But these are not supported by substantial evidence.

Since the 1960 resource estimates were placed in the record the entire Hanford resource, approximately equal to that of High Mountain Sheep itself, together with other projects programed or authorized, have ceased to be a matter of speculation and have become a reality. Hanford became a reality under a statute

by which the privately-owned utilities, including those comprising the Pacific Northwest Power Company, obtained a preference status with reference to one-half of the project's output.

The clouds of uncertainty are not dispelled by the references on page 39 of the Commission's opinion to recent developments. This is plainly a mere "postscript to the opinion. The recent developments there outlined relate to an agreement regarding the Canadian Treaty, of which the Commission may take administrative notice. The effects of this agreement and who will become the beneficiaries of the power resulting therefrom are not disclosed.

There has been no testimony, nor any cross-examination of witnesses unpon this subject. Accordingly, the finding that "there is nothing which presently indicates that this new supply of power obviates the feasibility of licensing the High Mountain Sheep Project to the Pacific Northwest Power Company at this time" is a finding not based upon substantial evidence.

The deficiencies in evidence before the Commission are of such grave import in evaluating the respective plans before the Commission, that at the very least it should vacate its order granting a license to the Pacific Northwest Power Company and reopen the proceedings for a further showing as to power resource forecasts upon the changed circumstances of 1964.

28946

VII.

The Commission erred in its failure to find as a matter of fact and of law, that construction of the High Mountain Sheep Project by the Pacific Northwest Power Company would gravely reduce the markets served by the Federal hydroelectric system; would have an adverse effect upon Federal revenues; and would result in unsaleable surpluses of various classes of electric service on the Federal system; would depreciate the value of the Federal system; and would adversely affect repayment of the Federal investment.

The record in this case shows unmistakably that the Bonneville Power Administration has incurred financial deficits for the past several years because of the existence of surplus electric power capacity in the Pacific Northwest region. The record further shows that such surplus will continue for several years in the future, following completion of the project licensed herein. We accordingly assert

that the untimely issuance of a license in this proceeding can only serve further adversely to affect repayment of the United States' investment in the Columbia River Power system. We remind the Commission of the rule it laid down to be followed in cases of this sort. In 1941, when it was asked to give Federal approval for construction of two power plants to compete with the United States' Central Valley Project, the Commission expressed itself unequivocally:

> Since the United States has a large investment in the Central Valley project and will spend millions of dollars more to make this development function as planned, the Commission obviously will do nothing to lessen the value of any revenue producing product of that development.[1]

We believe that rule is particularly applicable here.

28947

VIII.

In addition to the grounds hereinbefore set forth, each and all of the Exceptions of the Secretary of the Interior to the Examiner's decision, filed with the Commission on October 8, 1962, are adopted and incorporated herein as additional grounds for this Petition insofar as they are relevant.

CONCLUSION

In consideration of the foregoing errors of the Commission, Intervenor prays: (1) That the Commission grant a rehearing in this matter and set aside and annul the order of the Commission herein, and (2) that by reason of the changed circumstances relating to the need for the construction of the project, and the changed power re-

[1] 2 FPC 393 at 396.

sources of the region the order of the Commission should be reconsidered, set aside and this cause reopened for the further presentation of evidence and further hearing thereupon.

Respectfully submitted,

STEWART L. UDALL
Secretary of the Interior

By

/s/ FRANK J. BARRY
Solicitor of the
Department of the Interior
Washington, D. C. 20240

/s/ EDWARD WEINBERG
Deputy Solicitor of the
Department of the Interior
Washington, D. C. 20240

/s/ HARRY J. HOGAN
Counsel for the
Secretary of the Interior

28948

VERIFICATION

DISTRICT OF COLUMBIA) SS:

FRANK J. BARRY, being duly sworn, deposes and says that he is Solicitor of the Department of the Interior, that he prepared and is authorized to execute, and on March 6, 1964 did file on behalf of the Secretary of the Interior, petitions for rehearing and for a stay of the Federal Power Commission's Opinion and Order issued February 5, 1964 granting a license to the PACIFIC NORTHWEST POWER COMPANY, and that the facts alleged in such petitions are true

and correct to the best of his knowledge, information, and belief.

FRANK J. BARRY

Sworn to and subscribed before me this 16th day of March, 1964.

MARY M. MCLAUGHLIN
Notary Public

My commission expires February 29, 1968.

[Seal]

28954

BEFORE THE
FEDERAL POWER COMMISSION

In the Matter of

Project No. 2243
PACIFIC NORTHWEST POWER COMPANY

Project No. 2273
WASHINGTON PUBLIC POWER SUPPLY SYSTEM

Petition of Stewart L. Udall, Secretary of the Interior, for Stay

* * * * * * * * * *

28955

To the Honorable

The Federal Power Commission:

Comes Now Stewart L. Udall, Secretary of the Interior, Intervenor herein, and petitions this Commission for a Stay of its Opinion and Order entered February 5, 1964, in the above-entitled Proceeding.

In support of this Petition, Intervenor states that the purported Licensee herein has taken steps to initiate construction of a project costing hundreds of millions of dollars, for the purpose of developing one of this Nation's most valued water resources; that the license under which such action is being taken was issued by a closely divided Commission, and on the basis of controversial legal holdings of the very first impression; that rehearing is being sought of the divided Commission's action herein; and that, in the nature of this case, this Commission's action herein is subject to extensive litigation and to possible reversal upon judicial review.

Accordingly, the Secretary of the Interior petitions this Commission to stay any and all construction of said project by the

purported licensee, until the expiration of the appeal period or, in the event of an appeal, until the purported licensee's status as a licensee under said license is finally determined by the Court of last resort

As grounds in support of this position, the Secretary avers as follows:

I

That the interests designated below will be irreparably injured by further construction or construction activity by the purported licensee, if and in the event that the Commission's action in issuing the license herein later is reversed by the Commission or by the Courts, in the following particulars:

(a) The damage that will be inflicted on existing water and related land resources by such construction will be

extensive; and such damage will neither be remediable nor compensable.

(b) The expenditure of large sums by the purported license in this undertaking, ineluctably will operate to influence or to prevent the Commission, in the event the Commission should hold further proceedings in this matter, from recommending that the development of the water resource in question be undertaken by the United States.

(c) In the event the Commission should hold further proceedings in this matter, such construction or construction activity may operate later to prevent or prejudice the full development of the water resource in question by another licensee.

28957

(d) Such construction or construction activity may operate to damage the interests of the ratepayers and stockholders of the purported licensee, and of the many companies and electric power systems of the region with which the purported licensee and its holding companies may be electrically and and hydraulically interconnected.

II

That there presently is no regional need for the electric power to be produced by the subject project; and that there will not be a sufficient need therefor until several years following the presently contemplated completition date. No harm, financial or otherwise, will befall the purported licensee or its consumers or stockholders from the grant of the stay here requested.

III

That the granting of such a stay is within the discretion of this Commission; and that the possibility that the Com-

mission's decision will be overturned or substantially modified is ground for granting the stay herein requested. See *Airline Pilots Ass'n International* v. *CAB*, 215 F. 2d 122 (2nd Cir. 1954); but Cf. *Pacific Westbound Conference* v. *U. S.*, 92 F. Supp. 936 (D.C.N.D. Cal. 1956). The public interest is the critical factor in this as in other proceedings before Federal regulatory agencies. See *Virginia Petroleum Jobbers Ass'n* v. *Federal Power Commission*, 259 F. 2d 921 (1958).

IV

That the United States Securities and Exchange Commission acted to protect the interests of potential investors in this matter, by ruling on March 4, 1964, that the purported licensee will not become an electric utility company until the license issued to it has become final, "either by expiration of the appeal period, or in the event of an appeal, by the final determination of the appellate courts' affirming the grant." (SEC Release 35-15026, SEC File No. 50-55).

WHEREFORE, the Secretary of the Interior hereby petitions this honorable Commission to stay any and all construction of said project by the purported licensee, until the expiration of the appeal period or, in the event of an appeal, until the purported licensee's status as a licensee

under said license is finally determined by the Court of last resort.

Respectfully submitted,

STEWART L. UDALL
Secretary of the Interior

By

/s/ FRANK J. BARRY
Frank J. Barry
Solicitor of the
Department of the Interior
Washington, D. C. 20240

/s/ EDWARD WEINBERG
Edward Weinberg
Deputy Solicitor of the
Department of the Interior
Washington, D. C. 20240

/s/ HARRY J. HOGAN
Harry J. Hogan
Counsel for the
Secretary of the Interior

29002

BEFORE THE FEDERAL POWER COMMISSION

In the Matter of

PACIFIC NORTHWEST POWER COMPANY	Project No. 2243
WASHINGTON PUBLIC POWER SUPPLY SYSTEM	Project No. 2273

Answer of Stewart L. Udall in Opposition to Motion Filed March 16, 1964 By Pacific Northwest Power Company, to Strike the Application Filed March 6, 1964, By Stewart L. Udall for Rehearing and Petition to Reopen Proceeding for Reconsideration and for a Stay, and the Petition Filed March 6, 1964 By Stewart L. Udall for Stay

* * * * * * * * * *

29003

To the Honorable

The Federal Power Commission:

Comes now Stewart L. Udall, Secretary of the United States Department of the Interior, Intervenor, and, pursuant to Section 1.12(c) of the Commission's Rules of Practice and Procedure, does submit this Answer in Opposition to the above described Motion to Strike filed March 16, 1964 by Pacific Northwest Power Company (PNPC); does request the Commission to reject said motion; and does request the Commission to accept said application and petitions filed March 6, 1964 by the Secretary.

The grounds for the Secretary's opposition and request are as follows:

29004

I

Contrary to PNPC's claim, the Commission is not required to strike the Secretary's application and petitions

of March 6, 1964 on the ground that they were not filed under oath on March 6, 1964.

The Commission can waive its requirements that application for rehearing or petitions for a stay in proceedings under the Federal Power Act must be filed under oath. That requirement is not a statutory or jurisdictional requirement is not a statutory or jurisdictional requirement; it is not required by subsections 313(a) and (c) of the Federal Power Act (16 U.S.C. 825(1)). Instead, that requirement is imposed by the Commission's Rules of Practice and Procedure, "Section 134 *Application for Rehearing.* (a) *Form, Filing, and Service.*"

The verification requirement is a matter of form; it may be waived by the Commission; and the Commission has delegated its authority to do so to its Secretary. Specifically, Section 3.5(a) of the Commission's General Rules authorize the Secretary of the Commission to:

> (9) Waive requirements of the Commission's Rules and Regulations governing matters of form, when consistent with the public interest in a particular case.

The general rule governing this question is that failure to verify, when verification is required by the rule or statute, is not jurisdictional

and can be cured by amendment or subsequent verification.[1]

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[1] *Yuri Yajima* v. *United States*, 5 FRD 260 (6 FRD 260 (E.D. N.Y. 1946)); *Johnston Broadcasting Co.* v. *Federal Communications Commission*, 175 F. 2d 351 (D.C. Cir. 1949); *Henlopen Hotel Corporation* v. *Aetna Insurance Company*, 213 F. Supp. 320 (D.C. Del. 1963). For collection of authorities holding that imperfect verification is not a jurisdictional defect, see *In re Royal Circle of Friends Bldg. Corp.*, C.C.A. 7th, 1947, 1959 F. 2d 539, 541. For a discussion of the matter by the two most eminent authorities on Federal Rules of Civil Procedure, see 2 Moore's Federal Practice, par. 11.04 (2d Ed. 1948, cum. Supp. 1952), and 1A Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, Section 331.1.

The failure of counsel to file the Secretary's application and petitions of March 6, 1964 was based on a long established understanding between counsel for the Secretary and counsel for the Commission that it is not necessary for the Secretary, as cabinet officer of the United States, to file his representations to the Commission under oath. Nevertheless, on March 16, 1964, counsel for the Secretary remedied the defect of form of which PNPC here asks the Commission to take advantage. On that date counsel for the Secretary of the Department of the Interior filed with the Secretary of the Commission the verifications, notarized, called for by the Commission's Rules.

We believe it is in the public interest for the Secretary of the Commission, acting on its behalf, here to waive the defect of form which PNPC asks the Commission to take advantage, for the following reasons: (a) the requirement is merely one of form; (b) failure to observe it was based on a long established understanding with Commission counsel that it need not be observed by the Secretary; (c) the failure to observe it has been remedied; (d) the

failure in no way damaged the interests of PNPC, delayed the proceeding herein, or adversely affected the public interest; (e) the law gives the Commission the right to rehear or reconsider the appropriateness and of PNPC's proposed use of one of the Nation's major water resources! and (f) formalism should not be invoked, as PNPC here asks the Commission to do, to prevent the Commission from exercising its right to rehear or reconsider that use.[2]

[2] The hypertechnical nature of PNPC's claim is further shown by the fact that the other major federal regulatory agencies do not require petitions for rehearing to be filed under oath: Atomic Energy Commission, 10 CFR 2.771; Civil Aeronautics Board, 14 CFR 301.48 and 302.37; Federal Communications Commission, 47 CFR 1.191; Federal Trade Commission, 16 CFR 3.21 through 3.24; Interstate Commerce Commission, 49 CFR 1.101; Securities and Exchange Commission, 17 CFR 201.21(e).

The issues treated by Commission Opinion No. 418 involve matters affecting the future use of one of the Nation's major water resources, as well as the integrity and effectiveness of an immense investment commitment already made in the multipurpose use and development of that resource by the United States. Formalism should not be resorted to in order to prevent the Commission from considering such matters on the full scale intended by the Federal Power Act (viz. Sect. 313 (a)).

For the foregoing reasons, we respectfully request the Commission to waive the requirement of form here invoked by PNPC; and to accept the application and petitions filed herein by the Secretary of the Interior on March 6, 1964, as amended on March 16, 1964.

29007

II

Contrary to PNPC's claim, the Commission is not required to strike the Secretary's application for rehearing on the ground that the Commission's Order allowing the Secretary to intervene did not expressly state that the Secretary could file a petition for rehearing of any final order that legally aggrieved the Secretary.

On July 6, 1962, the Commission reopened the record in this proceeding to include the Secretary's letter of June 28, 1962 to the Commission (Exh. 43-A), urging the Commission in this proceeding to recommend to Congress that the United States undertake to construct and operate High Mountain Sheep Dam. On the same day, the Commission ordered that all parties should have an opportunity to file briefs on the Secretary's position in the

record.[3] In his Decision of October 8, 1962, the Examiner discussed the position of the Secretary extensively and in detail (Ex. Dec. pp. 84-96); and rejected it.

Accordingly, after the Commission extended the time for filing exceptions to the Examiner's Decision, and before the Commission announced it would hear oral argument herein on May 20, 1963, on December 3, 1962 the Secretary of the Interior petitioned to be allowed to intervene in this proceeding.

Among other things, in his petition the Secretary explained (1) that he has broad statutory responsibilities for the production and marketing of electric power in the Northwest; (2) that the entire cascade of dams of the Columbia River power system below the High Mountain damsite is owned by the United States and is operated by it for comprehensive purposes such as flood control, navigation reclamation, fishery management, pollustion control recreation, and power generation; (3) that United States development of High Mountain Sheep is necessary to achieve maximum coordination with existing and authorized United States water resource facilities in the Northwest, particularly those on the Snake and Columbia Rivers downstream from High Mountain Sheep; (4) that construction of a non-Federal hydroelectric storage project at that site will give non-Federal parties a controlling position over United States' facilities downstream; and (5)

[3] Extensive briefs thereon were filed by both applicants and by staff. Briefs thereon also were filed by the State of Washington Departments of Fisheries and Game, Oregon Public Utilities Commissioner, Washington State Department of Conservation, Columbia River Packers Association, Washington State Sportsmen's Council, Inc., Oregon Wildlife Federation, Fishermen's Cooperative Association, Inc., Northwest Fisheries Association, Alaska Fishermen's Union, Pacific Fish Conservation League and Makah Indian Tribe. All opposed Federal development.

that diverse ownership will result in less than complete hydraulic and electrical coordination of all facilities with corresponding losses of benefits, because—despite earnest efforts by the Commission—the endeavors of a non-Federal project owner to utilize the available water resources for its separate project purpose will operate to the detriment of United States' projects downstream. For these and other reasons, the Secretary asserted that the comprehensive development standard of the Act required the Commission in this particular case to recommend that the water resource in question be developed by the United States and not by one of the applicants. In short, by these and additional averments the Secretary's petition to

intervene made clear his legal interest[4] and standing[5] in this Commission proceeding.

PNPC's answer in opposition to the Secretary's petition to intervene was disregarded by the Commission. On December 14, 1962, the Commission found that (see Attachment): "in view of the importance of this case, it would not be inconsistent with the public interest to grant limited intervention to the Secretary and such intervention is granted with corresponding changes in the established procedures of the case, all as hereinafter set forth." Thereinafter, the Commission ordered that:

> The Secretary of the Interior is hereby permitted to intervene in the above-entitled proceedings subject to the rules and regulations of the Commission: *Provided*, that the participation of such intervener shall be limited to matters affecting asserted rights and

[4] *In the Matter of Virginia Electric and Power Co.*, 10 FPC 1 at 18 (1951).

[5] *United States ex rel. Chapman, Secretary of the Interior* v. *Federal Power Commission et al.*, 345 U.S. 153 at 156 (1953).

> interests as specifically set forth in the petition to intervene; *Provided, further,* that the participation of the intervener shall be limited to filing of exceptions to the Presiding Examiner's decision and participation in such oral argument as might subsequently be ordered; and *Provided, further,* that the admission of the Secretary as an intervener shall not be construed as recognition by the Commission that he might be aggrieved because of any order or orders of the Commission entered in this proceeding.

Then, changing "the established procedures of the case," the Commission granted the other parties twenty-one days to file a reply to the Secretary's exceptions.

29010

PNPC claims the December 14, 1962 Order prevents the Secretary from filing "Petitions for Rehearing" of the Commission's February 5, 1964 Order which legally aggrieves the Secretary. We disagree. Under the circumstances of this case, we do not believe the Commission's December 14, 1962 Order intended to prevent the Secretary from petitioning for rehearing. Under the circumstances of this case, we believe the Secretary qualifies as a "party" for Section 313(a) rehearing purposes by virtue of his authorized intervention and participation in the proceeding.

It is clear that the December 14, 1962 Order limited the participation of the Secretary; but we believe the Commission's Order intended the limitation to apply only to the issues to which the Secretary should confine himself. That is, the Order directed the Secretary to limit his participation to only those "matters affecting asserted rights and interests as specifically set forth in [his] petition to intervene" (most of which matters had not previously been

raised by the other parties), as distinguished from the many other matters in this proceeding relating to preference, preliminary permits, competing fisheries plans, alternative projects, and so forth.

Inasmuch as on December 14, 1962 the filing of exceptions to the Examiner's Decision and oral argument were the only possible procedural phases remaining prior to entering a final order in this proceeding, we believe the December 14, 1962 Order limited the Secretary's participation to the filing of exceptions and possible

oral argument in order to foreclose any effort by the Secretary to reopen the record at that time. In particular, because the Commission had found that "in view of the importance of this case it would not be inconsistent with the public interest to grant limited intervention to the Secretary" to protect his "asserted rights and interest," we do not believe the language in the Commission's Order granting the Secretary the right to file exceptions and participate in oral argument operated to deny the Secretary the right to request the Commission to reconsider any final order that legally aggrieved those rights and interests.

Our reasons for believing the Commission's reference to exceptions and oral argument was not intended to deny the Secretary the right to request rehearing of any order issuing a license are as follows:

(a) To insure comprehensive development as required by the Act, it is the Commission's duty to consider whether development of the water resource in question should be undertaken by the United States itself, or whether that water resource could be comprehensively developed by a licensee. The Commission undertook to determine this question in a contested proceeding, *and the Secretary is*

the only one of all the contesting parties and intervenors who urges that the Act requires the Commission to find that United States development is necessary to achieve and maintain comprehensive development.

29012

Therefore, we do not believe the Commission by its December 14, 1962 Order intended to refuse to consider and determine this central question on the scale that the Act anticipated and intended (viz. Sect. 313(a)). Similarly, we do not believe the Commission intended to cast the case in a procedural mold that would prevent the courts from reviewing the Commission's determination of that question.

(b) When the Commission issues orders permitting intervention, it is not Commission practice to state that intervenors may petition for rehearing of any Commission order finally disposing of the central matter under consideration.

(c) The Commission's December 14, 1962 Order stated that: "the admission of the Secretary, as an intervenor should not be construed as recognition by the Commission that he might be aggrieved by any order or orders entered by the Commission in this proceeding." Inasmuch as the sole purpose of such language is to prevent *parties* to Commission proceedings who are not legally aggrieved by final orders therein from seeking judicial review thereof, the inclusion of such language in the December 14, 1962 Order shows that the Commission therein acknowledged the Secretary as a party for purposes of seeking rehearing of so much of the Commission's final order on the merits herein

29013

that might aggrieve the rights and interests of the Secretary.

In reaching the conclusion expressed here, the Secretary is not unmindful of cases holding that only parties may request rehearing under Sect. 19 of the Natural Gas Act (at 15 USC 717a—the counterpart of Sect. 313 of the Federal Power Act). The point made here is that the scope and extent of the Secretary's participation herein qualify him as a party for the purpose of asking the Commission to reconsider—in the light of the existing record and matters of which the Commission took and may take official notice—whether the Commission should recommend development by the United States. The Secretary does not find it necessary at this juncture to dispute the holdings referred to above. To repeat, the Secretary's position is that the status of a party for rehearing purposes can be found to depend ultimately, as here, on such things as the extent of his participation in the proceeding, whether or not denominated as limited; the importance and nature of the Commission proceedings to the public interest; and the extent to which the participant represents a public or governmental interest as distinguished from a personal, proprietary interest; and the importance of the participant's position relative to the final holding in the proceeding.

The scope, extent, and importance of the Secretary's participation herein are shown synoptically by the following:

(a) The Commission ordered the record to be opened to include the Secretary's June 28, 1962 statement of position.

(b) The Commission granted all parties and intervenors the right to file full briefs on the Secretary's position; and all of them did so.

(c) The Examiner spent 12 closely written pages of his Decision analyzing the Secretary's position before rejecting it and recommending that PNPC be licensed.

(d) The Secretary filed a lengthy, expositive petition to intervene with the Commission, and urged it not to issue a license and to recommend U. S. development.

(e) Applicants and others filed briefs with the Commission opposing the Secretary's petition.

(f) The Commission found "in view of the importance of this case, it would not be inconsistent with the public interest to grant the Secretary limited intervention" in all remaining phases of the proceeding.

(g) The Commission granted all the other parties the right "to file any reply they consider necessary or appropriate" to the Secretary's exceptions to the Examiner's Decision.

(h) The Secretary filed exceptions (totalling 101 pages) to the Examiner's Decision respecting matters affecting the Secretary's rights and interests herein; and the other parties filed extensive replies in opposition to the Secretary.

(i) During oral argument before the Commission, the Secretary elucidated his position in response to the Commission's questioning and to the criticism of that position by other parties during argument.

(j) In its final Order herein of February 5, 1964. the Commission, after evaluating the Secretary's proposal (Op. pp. 36-39) held:

> In summary, the delay inherent in federal construction would foreclose power coming on the line at a time when it will be required. This disadvantage out-

weighs those benefits which Interior contends would result from federal construction (i.e., superior coordination and nonpower benefits discussed above), assuming *arguendo,* that such benefits would be realized.

(k) The Commission licensed PNPC by a split decision on a question of first impression regarding "priority." If found wrong on "priority," the Commission announced, "it might then be necessary to re-evaluate the Secretary's proposal" (Op. p. 39).

We believe that the right of the Secretary to intervene in this proceeding, his admission by the Commission, the extent of his participation, and the importance of that participation to the correct disposition of the resource to be made herein, operate to qualify the Secretary as a party for the purpose of seeking rehearing of so much of the Commission's Order of February 5, 1964 that affects his interests, rights, and responsibilities herein. We believe that the right to rehearing is within the scope and intent of the Commission's Order of December 14, 1962 properly interpreted in the context of the proceeding subsequent thereto.

29016

We do not believe the over-all intent and purpose of the Federal Power Act anticipates or requires the Commission to impose a rigorous, hyper-juridic test of "party" for the purpose of rejecting a Cabinet Officer's request that the Commission reconsider its disposal of one of the Nation's major water resources. Courts do not rigorously apply that requirement; we see no reason, statutory or procedural, why the Commission should do so in this particular proceeding under Title I of the Federal Power Act. We do not believe the Commission intended to do so when it issued its Order of December 14, 1962; we do not believe

the Commission should do so now. Regression to the inhibiting rigors of common law pleading is neither to be imputed to nor expected of a federal regulatory agency charged by law with administering a statute dealing so broadly with the disposition of the Nation's water resources and the occupancy of its public and reserved lands. We did not impute such rigidity and regression to the Commission when it issued its December 14, 1962 Order; the law does not impute such rigidity and regression to the Commission now.

As set out in the Secretary's Application and Petition filed March 6, 1964, it is there the position of the Secretary that, among other things, (1) the intent of Section 7(b) and 10(a) of the Federal Power Act is that the United States should develop the headwater storage project in question here; (2) that the licensing

of PNPC's project at this time constitutes premature licensing; (3) that the data or record on which the Commission predicates its final action herein is obsolete and should be up-dated before the Commission disposes of this matter; and (4) that "those benefits which Interior contends would result from Federal construction" do outweigh the alleged (yet undefined) "delay inherent in Federal construction" (Op. at p. 39). The Secretary believes full reconsideration of these matters is essential to the proper administration of the Federal Power Act, and to the proper disposition and use of the Nation's water resource at stake here.

Accordingly, the Secretary respectfully requests the Commission—

(1) to deny or to disregard PNPC's motion to strike on the ground set out in Point 2 thereof;

(2) to recognize, by whatever action the Commission deems appropriate, that under the circumstances of this case the Secretary is a party to this proceeding for the purpose of requesting rehearing of so much of the Commission's final order herein as may aggrieve him; and

29018

(3) to accept the Secretary's Application and Petition filed March 6, 1964.

Respectfully submitted,

STEWART L. UDALL
Secretary of the Interior

By

/s/ FRANK J. BARRY
Solicitor of the
Department of the Interior
Washington, D. C. 20240

/s/ EDWARD WEINBERG
Deputy Solicitor of the
Department of the Interior
Washington, D. C. 20240

/s/ HARRY J. HOGAN
Counsel for the
Secretary of the Interior

29019-29024

(CERTIFICATE OF SERVICE)

29025

[Docketed March 26, 1964]

BEFORE THE FEDERAL POWER COMMISSION

In the Matter of

PACIFIC NORTHWEST POWER COMPANY — Project No. 2243

WASHINGTON PUBLIC POWER SUPPLY SYSTEM — Project No. 2273

Motion of Stewart L. Udall, Secretary of the Interior, to Strike or in the Alternative to Reopen the Record

To the Honorable

The Federal Power Commission:

Comes now Stewart L. Udall, Secretary of the United States Department of the Interior, Intervenor herein, and moves the Commission to strike those extra-record representations of the Pacific Northwest Power Company (PNPC) regarding the regional power resources and requirements of the Pacific Northwest set forth on page 4 of PNPC's "Answer to Applications for Stay" filed March 17, 1964; or, in the alternative, to reopen the record for the purpose of correctly determining the future point in time when the regional power resources and requirements of the Pacific Northwest will necessitate or realistically justify construction of a multi-purpose, hydroelectric storage project at the High Mountain Sheep site.

As grounds in support of this motion, the Secretary of the Interior states as follows:

29026

At the top of page 31, speaking of "Power Resources and Requirements", Opinion No. 418 states: "Evidence was presented by PNPC, WPPSS, and staff on the load

requirements of the Pacific Northwest and on resources to meet those requirements".

That evidence was prepared in the fall and early winter of 1959. Subsequent developments materially altered the accuracy of those estimates. Additional authorizations or undertakings to increase the power supply of the region which were not anticipated or accounted for by the evidence above-referred to, include: (a) authorization of at least nine new hydroelectric projects to be built in the Northwest; (b) initiation of construction of generation facilities at the Hanford nuclear reactor project; and (c) the signing by President Johnson and Prime Minister Pearson of an agreement under which the Canadian entitlement to power resulting from the Canadian treaty will be sold in the Pacific Northwest. The anticipated California intertie will also materially alter the accuracy of the 1959 evidence.

These developments, or the imminence thereof, have destroyed the accuracy and reliability of the evidence used to justify the need for High Mountain Sheep. This is unquestioned. The magnitude of the changes, and the extent to which they alter estimates made in 1959 as to the time when and place where the output of that new project would be needed and marketed, remains unknown, unprobed,

unrecorded, untested; but not unrecognized. The parties have referred in fragmentary fashion to the extra-record existence of these developments and the Commission itself did so also. (Op. pp. 31 and 39).

Past neglect or optimism in licensing new projects in the Northwest without more realistically determining their proper phasing or timing has brought about an economically and financially serious imbalance of power resources

and requirements in that region.[1] The Secretary has respectfully suggested that the Commission not exacerbate, or extend the duration of that imbalance, and the economic and financial crises attendant thereon, by prematurely licensing another Northwest project at this time.

Throughout this proceeding, it has been and continues to be the position of the Secretary that, among other things, the record in this case should be reopened to enable the Commission to obtain the substantial and probative evidence which is required to determine when High Mountain Sheep Dam should be constructed. The Secretary again emphasizes his understanding that in the exercise of its authority to recommend or license hydroelectric projects in the Northwest the Commission acts in a quasi-legislative capacity as the agent of the Congress. This project should be constructed at a time that is compatible with the financial solvency and integrity of the many projects already placed or authorized in that region by the Congress.

29028

In an effort to achieve a complete triumph of form over spirit, on March 16, 1964, PNPC has moved Commission to strike the Secretary's petition that the Commission rehear and reconsider its action herein. By this artifice, PNPC would preclude the Commission from basing its action on tested, record evidence, rather than on what "appear" *in camera*, to be the needs of that region.

Yet, "comes now Pacific Northwest Power Company" in a document filed with the Commission on March 17, 1964, and admits and attempts to supplement the inadequacy of

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[1] See, for example, Commission Opinion No. 283 and Order issuing license for Projects Nos. 1971, 2132 and 2133, 14 FPC 55 (1955); and subsequent orders extending the time for construction thereof.

the record on this point. "The facts are". PNPC states at page 4 of that pleading, that: "(b) The most recent load and resources projections, made available to us by the Bonneville Power Administrator, show that, including Canadian storage, there would be a deficit in regional resources to meet regional load in each year after 1970-71 without High Mountain Sheep."

The Secretary does not know what load and resources projections PNPC is referring to. We appreciate that Counsel for PNPC is sensitive to the devastating effect of the area resource surplus argument and is anxious to reassure the Commission that its decision to license the project now is correct. We must, however, state emphatically that there is no basis that we are aware of, either in the load and resource projections of the Bonneville Power Administrator, or of those of anyone else including PNPC, for the statement that, "including Canadian storage, there could be a deficit in regional resources to

meet regional load in each year after 1970-71 without High Mountain Sheep."

The Secretary respectfully informs the Commission that the most recent load resource projections which Bonneville Power Administration has furnished to the companies comprising PNPC is a tabulation, dated January 21, 1964. This shows that, excluding High Mountain Sheep, area firm surpluses for both peaking capacity and energy extend through 1973-74. Specifically, this tabulation shows a peaking capacity surplus of 380,000 kilowatts for 1973-74, and an energy surplus of 2.9 billion kilowatt hours for 1973-74. Larger surpluses are shown for the intervening years.

In his petition for rehearing herein, the Secretary has respectfully suggested that this honorable Commission

need not rely upon rumor, representation, or appearance as to the time when or place where the output of High Mountain Sheep will be needed.[2]

29030

WHEREFORE, the Secretary respectfully requests the Commission to strike those extra-record representations regarding the regional power resources and requirements of the Pacific Northwest set forth in PNPC's "Answer to Applications for Stay," or, in the alternative, to reopen the record for the purpose of determining the future point in time when regional power resources and requirements will necessitate or realistically justify construction of High Mountain Sheep.

Respectfully submitted,

STEWART L. UDALL
Secretary of the Interior

By

HARRY J. HOGAN
Harry J. Hogan
Counsel for the
Secretary of the Interior

[2] The Secretary makes no legal arguments in support of his request that the record be reopened; for the Secretary is confident that the Commission will exercise its discretion on this matter in the light of the law. The Secretary finds the law of the cases on this point (although none involved disposal of the Nation's water resources,) noted accurately at 2 *American Jurisprudence, Administrative Law*, § 534 (1962).

29045

[Docketed April 3, 1964]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

PACIFIC NORTHWEST POWER COMPANY Project No. 2243

WASHINGTON PUBLIC POWER SUPPLY SYSTEM Project No. 2273

Order Granting Rehearing for Purpose of Giving Further Consideration

(Issued April 3, 1964)

Applications for rehearing of the Commission's order issued February 5, 1964, in the above-entitled proceeding were filed on March 6, 1964, by Washington Public Power Supply System (WPPSS), the Department of Conservation of the State of Washington, and the Secretary of the Interior.

WPPSS and the Secretary of the Interior also filed motions for stay of the Commission's order, and in addition to the Secretary of the Interior also included a petition to have the record reopened in his filing. Pacific Northwest Power Company (PNPC) on March 16, 1964, filed motions to strike the March 6 filings of the WPPSS and the Secretary of the Interior. PNPC also filed an answer to the motions for stay of the Commission's order on March 17, 1964.

WPPSS filed an answer to PNPC's motion to strike on March 23, 1964. The Secretary of the Interior filed his answer to PNPC's motions to strike on March 25, 1964, and

on March 26, 1964, the Secretary filed a motion to strike material from PNPC's motion to strike or in the alternative to reopen the record.

The Commission finds:

In order to afford additional time for consideration of the matters setforth in the said applications, it is appropriate in the administration of the Federal Power Act that rehearing be granted.

29046

The Commission orders:

Rehearing is granted for the purpose of further considering the issues raised by the said applications of WPPSS, the Department of Conservation of the State of Washington, and the Secretary of the Interior.

By the Commission.

(SEAL) JOSEPH H. GUTRIDE,
Secretary.

29060

[Docketed April 20, 1964]

BEFORE THE FEDERAL POWER COMMISSION

In the Matter of

PACIFIC NORTHWEST POWER COMPANY	Project No. 2243
WASHINGTON PUBLIC POWER SUPPLY SYSTEM	Project No. 2273

Response in the Nature of an Answer By Stewart L. Udall, Secretary of the Interior, Intervenor, to the Applications for Rehearing of Washington Public Power Supply System and the Department of Conservation of the State of Washington

* * * * * * * * * *

29061

To the Honorable
The Federal Power Commission:

Comes now Stewart L. Udall, Secretary of the Interior, Intervenor herein, and pursuant to the Commission's Order issued in the above-entitled proceeding of April 3, 1964, and to Section 1.34(d) of the Commission's Rules of Practice and Procedure, does file this response to the applications for rehearing of the Commission's Order and Opinion issued February 5, 1964, in this proceeding, filed by the Washington Public Power Supply System and by the Department of Conservation of the State of Washington, and as his response thereto does state as follows:

The Secretary's Response is addressed to matters relating (1) to marketing issues, (2) to Federal development, and (3) to coordination. These matters are set forth in WPPSS' Petition for Rehearing beginning at pages 36, 67, and 70 thereof, respectively.

29062

I. Marketing Issues

WPPSS asserts that the record herein contains all of the "essential facts" required to show that WPPSS could absorb or could market the output of High Mountain Sheep; and that the Commission erred in holding that a further hearing on the issue of marketing would be necessary to support issuance of a license to WPPSS.

The Secretary states that the output of additional Northwest projects scheduled and authorized since the record herein was closed will serve to meet all the power requirements, both public and private, of the entire Northwest until the year 1974. Presently scheduled projects will meet the requirements of Northwest preference agencies

alone until the year 1979-1980. Therefore, High Mountain Sheep is surplus to the needs of the region.

WPPSS asserts (Application p. 69) there is no evidence of record to support the Commission's statement that: In the event the Commission cannot license PNPC, it might be necessary for the Commission to reevaluate the Secretary of the Interior's proposal because WPPSS' "fortunes are so inextricably entwined with those of Interior Department."

The Secretary states that the record, inadequate as it is, does show that the BPA system and that of the Supply System are "inextricably entwined." The record shows that the Bonneville Power System has met the requirements of the WPPSS member systems for the past quarter-century; and that the BPA system presently is suffering and for many years in the future will continue to suffer a serious loss of revenue because of the existence of surplus United States generating capacity. The Secretary

states that the withdrawal or reduction of WPPSS loads from the United States system will exacerbate that loss of revenue and will redound to the detriment of the entire region, including the WPPSS member systems.

Indeed, the Commission's holding regarding the interdependent relationship of WPPSS and BPA is applicable to PNPC as well. Both the Supply System and PNPC serve the Pacific Northwest. Their systems are part of the generating, transmission and marketing systems which are coordinated in one great complex to meet loads in the Northwest. The fortunes of all are "inextricably entwined."

II. United States Development

Contrary to WPPSS' claim (Application p. 69), the WPPSS cannot comprehensively develop the water re-

sources affected in this proceeding on the scale required by the Federal Power Act. The Secretary states that it is not possible for any non-Federal applicant to make such a showing; and that the standard of comprehensive development requires the Commission to recommend that High Mountain Sheep be developed by the United States at the appropriate time.

The primal operative fact of this proceeding is that High Mountain Sheep is first and foremostly a headwater storage project. If licensed for the next 50 years, this headwater storage project will exercise a continuing, quasi- sovereign control over the passage and delivery of Snake River waters to all water resource projects constructed and operated downstream therefrom—each and every one of which is owned and operated by the United States.

As shown by the comprehensive plans of the United States Corps of Engineers from which applicant's proposal derives, the planning,

design, and engineering of this headwater storage project by the Corps was predicated on the belief that, because of the project's controlling effect on existing and planned multipurpose projects downstream therefrom, the construction, ownership, and operation of High Mountain Sheep "for public purposes should be undertaken by the United States itself" (Section 7(b) of the Federal Power Act, as amended, 16 U.S.C. 800).*

* The Commission's Order herein of February 5, 1964, does not contain the formal Finding made in other license proceedings, that development of the water resources in question should not be undertaken by the United States. Compare, for example, Special Finding No. 45 in Projects Nos. 1971, 2132, and 2133, 14 FPC 71 at 78 (1955), to wit:

(45) The proposed developments will not use any Government navigation dam, nor will the issuance of a license therefor as hereinafter provided affect the development of any water resources for public purposes which should be undertaken by the United States.

29065

III. Coordination

WPPSS asserts that the Commission's failure to find that WPPSS has demonstrated a greater basis than PNPC for coordination is error.

The Secretary responds that neither WPPSS nor PNPC has developed an adequate record on coordination. In regard to this most important matter, the Commission merely held that: "There is no evidence upon which we can determine the scope or seriousness of this matter in the content of a river system which already has a number of different project operators and an existing coordination system."

Coordination means that regional resources should be operated as if under single ownership. It means that headwater storage reservoirs should be utilized not primarily for at-site production, but equally to produce power successively at all plants downstream. The record does not demonstrate the manner in which (either) applicant will coordinate the project in question; the circumstances under which it will be required to coordinate; or the financial and other terms on which it will be compelled to coordinate.

This issue lies at the heart of the case. The Secretary submits that these questions necessarily must be resolved, to the

29066

maximum extent practicable, prior and not posterior to issuance of a license defining the extent to which the water resources affected herein should be comprehensively developed and utilized over the next half-century. The Com-

mission may not defer resolution of this vital matter in an unknown manner, to an unknown date in the future.

Respectfully submitted,

STEWART L. UDALL
Secretary of the Interior

By

/s/ FRANK J. BARRY
Solicitor of the
Department of the Interior
Washington, D. C. 20240

/s/ HARRY J. HOGAN
Counsel for the
Secretary of the Interior

Washington, D. C.
April 20, 1964

29067

VERIFICATION

DISTRICT OF COLUMBIA ss:

FRANK J. BARRY, being duly sworn, deposes and says that he is Solicitor of the Department of the Interior, that he prepared and is authorized to execute and to file, on behalf of the Secretary of the Interior, the foregoing Response in the Nature of an Answer by Stewart L. Udall, Secretary of the Interior, Intervenor, to the Applications for Rehearing of Washington Public Power Supply System and the Department of Conservation of the State of Washington, and that the facts alleged in such Response are

true and correct to the best of his knowledge, information, and belief.

FRANK J. BARRY
Frank J. Barry

Sworn to and subscribed before me this 20th day of April, 1964.

(SEAL) MARY M. MCLAUGHLIN
Notary Public

My commission expires February 29, 1968

29111

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 418-A

PACIFIC NORTHWEST POWER COMPANY Project No. 2243
WASHINGTON PUBLIC POWER SUPPLY SYSTEM Project No. 2273

Opinion and Order on Rehearing and Denying Motions for Stay and to Strike

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29112

filed

Ross, Commissioner:

Applications for rehearing and stay were field on March 6, 1964 by the Department of the Interior, the Department of Conservation of the State of Washington, and the Washington Public Power Supply System (WPPSS) with respect to our Opinion and Order No. 418 issued February 5, 1964. Pacific Northwest Power Company (PNPC) filed a motion to strike the applications of Interior and WPPSS on March 16, 1964. Thereafter on March 26, 1964, Interior

filed a motion to strike or, in the alternative, to reopen the record. Responsive pleadings to the above applications and motions have also been filed.[1]

In our Opinion and Order we determined that the proposed hydroelectric project at the High Mountain Sheep Site is best adapted to a comprehensive plan for developing that reach of the Snake River above the mouth of the Salmon River, as opposed to the Nez Perce site below the mouth of the Salmon River. We also granted a license to the Pacific Northwest Power Company (PNPC) rather than to WPPSS, and refused to recommend federal development. We are of the opinion that the points raised have been largely covered by our original opinion, but will add the following comments to clarify our position.

Interior initially reargues that "there is no present regional need for the power to be generated by the High Mountain Sheep project which would balance the probable damage to the fish resource." In our original opinion we took cognizance of developments affecting the power generating capability of the Pacific Northwest which occurred since the close of the record. Specifically, we considered the power to be generated by Hanford, Wells and from Canadian Storage. On the basis

of the record, including the recent developments, we found a regional need for the power HMS would generate by 1970-1971, and that PNPC particularly would need additional power by 1967-1968. While Interior disagrees with our conclusion, it alludes to no facts to support its position. We have nevertheless reexamined this issue and

[1] On April 4, 1964, the Chief of the Forest Service, Dept. of Agriculture, filed a letter in which he requested amendment of Article 53. While the propriety of this filing is open to question, we have duly considered it but believe the amendment he suggests is not appropriate.

find that HMS power will be needed on a regional basis by 1970-1971 as we originally concluded, to which PNPC and WPPSS both agree.

Interior also argues that the Commission erred in not recommending federal development under Section 7(b) of the Federal Power Act. Section 7(b) provides that, "Whenever, in the judgment of the Commission, the development of any water resources for the public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development." The Department interprets this section to mean that once there are Federal projects on a river, all projects possibly affecting them must be undertaken by the United States. The Department states that on the Columbia River system, the choice has been made for us by the Congress.[2] For the reasons stated in our original opinion, we disagree with this interpretation.

In addition, Interior argues that federal development is necessary to achieve that coordination necessary to obtain maximum use of HMS for flood control, navigation and power purposes. We disagree.

With respect to flood control, Article 51 requires PNPC to operate HMS in a manner consistent with optimum flood control purposes at no cost to the government for the loss of any power resulting from such operation.[3] The specific

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[2] The Department states on p. 8: "Thus, as to the water resource through Asotin, the 'judgment' of the Commission has been replaced by the judgment of Congress."

[3] "*Article No. 51.* In the interests of flood control downstream from the project, the Licensee shall operate the project in accordance with an agreement to be entered into by the Licensee and the United States Corps of Engineers for the purpose of determining detailed operating procedures for use during flood periods, in accordance with the following principles:

a. The total live storage space of about 2,250,000 acre-feet between eleva-

terms of the operation of HMS for flood control purposes are made subject to agreement between Corps of Engineers and the licensee in accordance with principles contained in the Article. This article is consistent with PNPC's unqualified commitment to operate HMS in such manner.[4] Upon our own motion, we are

29114

eliminating the last sentence of Article 51 since it is ambiguous and adds nothing of substance to the Article.

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tion 1337 and elevation 1510 mean sea level will be made available for flood control use if and as required.

b. The reservoir level will be no higher than elevation 1475 by 1 March each year to provide about 600,000 acre-feet of storage space for flood control use at that time each year. Additional storage space will be made available between 1 March and the beginning of the flood period to insure the availability on 1 May of the total capacity needed for flood control as estimated by the Corps of Engineers.

c. The space made available as set forth above will be retained until capture of flood flows is requested by the Corps of Engineers, subject to involuntary storage as may be required due to excess of inflows over outlet capacity, or until refilling is authorized by the Corps of Engineers. In the event of involuntary storage during flood control operations, full storage capability will be regained as soon as possible.

d. During the flood storage period controlled outflows will be as warranted by flood control requirements as determined by the Corps of Engineers with due regard to the requirements for the optimum multiple purpose operations of the project. When the Columbia River discharge at The Dalles is 600,000 cfs or higher the daily outflow may be reduced to a minimum of 10,000 acre-feet; except that during years of severe flood conditions the daily outflow may be reduced to a minimum of 4,000 acre-feet. Below 600,000 cfs discharge at The Dalles, the outflow will be determined with due consideration given to all purposes of the project.

e. A discharge capacity of 65,000 cfs at minimum pool elevation 1382 is to be provided by the Licensee. This discharge capacity is based on the gated outlet capacity plus one half of the ultimate turbine hydraulic capacity.

The agreement will be subject to review from time to time as requested by the Licensee or the Corps of Engineers."

[4] "We have said to you positively we will produce flood control storage from this project as requested by the Corps of Engineers, without compensation, at any time, with or without Canadian storage at any time, without reservation, we will do it." (Tr. 14,770-1)

In addition, Article 52 requires PNPC to maintain a minimum flow of not less than 13,000 cfs when determined to be required—not by PNPC—but by the Corps of Engineers.[5] PNPC is not entitled to reimbursement for operating in this manner despite the fact that power benefits may accrue to the downstream federal plant. The minimum flow specified conforms precisely to that recommended by the Corps of Engineers. (FPC Ex. 37)

Article 14 constitutes the provision requiring the licensee to coordinate electrically and hydraulically for power purposes.[6] This Article presupposes, as does the coordination of any endeavor, the willingness to plan cooperatively in order to serve the region in the most effective and enlightened manner. Certainly, the object of providing the optimum firm load carrying ability and of producing the maximum amount of usable secondary energy for the region could be frustrated by any participant, be he federal, public or private. However, it is beyond rea-

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5 "*Article 52.* In the interest of navigation the project shall be operated in accordance with the following requirements:

a. Minimum flow of not less than 13,000 cfs will be maintained at Lime Point, Idaho, during annual storage refill season when determined to be required by the Corps of Engineers in the interest of navigation. Flows of up to 16,500 cfs may be required at other times when determined by the Corps of Engineers to be necessary in the interest of navigation.

b. River fluctuations in the reach between Lewiston and Lime Point resulting from project operation shall not exceed a rate of one and a half feet per hour on the rising stage, and one foot per hour on the falling stage unless otherwise approved by the Corps of Engineers."

6 "*Article 14.* The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other power systems and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order."

sonable belief that any responsible agency, whether federal, public or private, would in the face of enlightened public opinion deliberately seek to sabotage the object of Article 14 which was designed to secure for the Northwest benefits heretofore recognized but, until recently, seldom obtainable for a mixed river basin system.

29116

Interior for the first time in its application for rehearing, questions the adequacy of Article 14 which, until now, enjoyed the support of all the parties in the case. Interior's objective and purpose, namely, "to optimize regional power production consistent with other water resource development and purposes", is the same as ours. We, like Interior, recognize that "coordination may permit storage of water in one party's reservoir for the benefit of another. It may permit an exchange of winter energy from one system for summer energy of another thereby increasing the firm capabilities of both systems. It may reduce the requirement of reserve capacity to the benefit of both systems. It may permit the joint use of transmission facilities or the exchange of energy between systems so as to reduce transmission requirements."[7] In addition, coordination may include the planning of new generating resources and scheduled maintenance and the sharing of resources.

We believe that, in keeping with the spirit referred to above plus the legal effect of Article 14, we will achieve the notable results sought by us all. However, we do not believe that the Article proposed by Interior, insofar as it refuses to recognize an equitable sharing of benefits in the context of a mixed system of plants in a common basin,

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[7] Comments of Interior, March 13, 1964, p. 22-23, Project No. 1971.

will result in the maximum economic benefit to the region.[8] Only by recognizing the contributions of each system in providing for an equitable sharing of benefits will the optimum development of our resources envisioned by the framers of the Water Power Act become a reality. This represents nothing novel to this region. As a matter of fact, this approach is entirely consistent with the principles underlying the Pacific Northwest Coordinating Agreement, an agreement to which Interior (BPA), PUD's and private power companies are parties.

We do agree with Interior that the licensee should be obliged to provide transmission facilities necessary to effectuate the desired coordination. It had been our understanding that this requirement was implicit in Article 14. In view of Interior's concern, it is apparent that this understanding is not shared by all interested parties. We will therefore amend the Article to expressly include this requirement in order to obviate any debate in the future. We are also modifying the Article to clarify our original idea that this Article is designed to maximize power production and other beneficial public uses.

Beyond the changes noted above, we are satisfied that Article 14 requires no further modification. We have described the general principles applicable thereto and do not consider it feasible to reduce them into concrete terms at this time. By the time HMS will be ready for operation, the factual situation and the consequent requirements may be substantially different from those prevailing at this time.

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[8] This is not to say, as Interior alleges, that Article 14 requires the federal government to pay for headwater benefits—a payment precluded by Section 10(f) of the Act. As we have earlier stated, Article 14 does not require 10(f) payments. *P.U.D. No. 1 of Douglas County, Project No. 2149*, 28 FPC 128.

WPPSS's principal objection relates to our interpretation of the priority afforded by a permit. WPPSS misunderstands the significance of the preference and priority provisions of the Act. The priority provisions were not designed to counter-balance the preference rights of public bodies. To the contrary, the priority sections have independent significance and are not directed to the public-private power controversy. The purpose of the priority provisions is to encourge development of the nation's waterways by giving reasonable protection to a party investigating the development of a given reach of the river. Obviously, there would be little incentive to conduct costly and time-consuming studies of a particular reach if another party could, after the studies were completed, file a competitive application and have at least equal rights with the party making the investigation. The priority provisions were drawn to afford protection to one who makes such investigations, irrespective of whether the party involved is a private or public agency.

During the present age which is witnessing a move toward large scale generation and integration, it is evident that the priority provisions of the Act will assume greater significance for municipal bodies as between themselves. No longer are such agencies restricted to a relatively small area. WPPSS, a Washington municipality, for example, is here applying for a project on the Idaho-Oregon boundary. Future cases will undoubtedly witness competitive license applications by local and distant municipal bodies. Needless to say, the question of priority could be decisive in such cases.

WPPSS argues that our decision disregards and completely reverses policies, interpretations and practices of the Commission, established and consistently followed for

over forty years. Specifically, WPPSS charges that our finding that PNPC has priority under its preliminary permit is contrary to a General Counsel's opinion issued in 1923 (and not heard from again for all practical purposes until this case). As we stated initially, the General Counsel was issuing an opinion in response to the question whether priority could survive a three-year period if a license application were filed before the term of the permit expired. Our decision herein is consistent with this opinion.

The General Counsel's opinion does contain extraneous language. However, for us to rely, as a binding precent, upon a gratuitous dictum remark of a General Counsel made years ago—untested by the sharp exchanges of learned opposing counsel whose clients have much at stake as in this case, is carrying the doctrine of reliance upon dicta to an extreme which twists a legal principal beyond recognition. Moreover, WPPSS has admitted that we are dealing with "a purely legal issue not heretofore decided by either the Commission or the Courts."[9]

29118

On page 29 of its application WPPSS states its position with respect to the protection afforded by a permit. Because this position is identical to that we have adopted we cite it in full:

> "'Reasonable security' under a permit is not insubstantial. It consists of:
>
> (a) Protection pending investigation against the acceptance for filing of license *applications* by others *affecting the same reach* (FPC Reg. § 4.30)"; (Application for Rehearing, p. 29) (Emphasis added)

[9] WPPSS application for stay, p. 3. The minority also agree that this is a case of first impression. Dissent, p. 19.

The regulation cited by WPPSS reads as follows:

> § 4.30. An application for license may be filed by any citizen, association of citizens, corporation, State, or municipality desirous of obtaining a license pursuant to the act: *Provided, however,* That if a preliminary permit has been issued, no action on applications by others than the permittee *covering in whole or in part the same reach* of stream or streams shall be taken that might infringe on the rights of the permittee under sections 5 and 7 of the Federal Power Act." (Emphasis added)

Both WPPSS and our regulations thus confirm our view that the scope of a permit extends beyond the incredibly narrow confines of mileage location, exact to the tenth of a mile, and project description including the height of the dam to the foot, as described therein. We are satisfied that permits provide a priority to the reach of the river encompassed by the project described in the permit.[10]

WPPSS argues that the result of our interpretation of priority may be to trigger a race for preliminary permits for the purpose of tying up all major undeveloped water resources of the country. This is reminiscent of the fears expressed during the hearings and debate on the Water Power Act by some members of Congress to the effect the private power companies would immediately file for all the good sites. The flood did not occur. The same is true regarding WPPSS's concern. Whatever the basis for WPPSS's insight, it seem unjustified. There has not been a single application for a preliminary permit filed since the time our original decision was released.

[10] Throughout its application WPPSS attempts to inject an element of confusion as to exactly what reach is covered by PNPC's permit. The stipulation entered at the prehearing conference in this case resolves any alleged confusion on that score. See original decision, note 10.

WPPSS also argues that a permittee must apply for an amendment if it desires to construct a project different from that described in the permit. Whether amended permits would be granted would depend, in WPPSS's view, upon undescribed "facts" and whether a preference agency filed a competitive application. Under this view, a permittee would have no flexibility to develop the best project on the reach involved. In effect, the permittee would have an assurance of protection exclusively for the project described in the permit, which is really no protection at all. As we stated in our decision, there has never been a project constructed exactly as initially described in a permit to our knowledge.

In this connection, it is interesting to note that the minority also rejects this view. Actually, the minority essentially agrees with our position on priority, with the sole exception noted below. This should not be surprising because the minority recognizes the obvious need "that an applicant be allowed flexibility and be encouraged to study all reasonable alternatives, including those not known at the time of an application for a permit." The minority suggests that "the way to obtain this flexibility, however, is by allowance of needed amendments."

The meaning of the minority approach can best be understood by the following examples. Municipality A after conducting studies under a two-year permit[11] covering a certain reach of the river X-Y discovers that a site one-tenth of a mile downstream would permit increased power generation at lesser costs and at the same time more fully develop the recreational, flood control, navigation and other

[11] The usual term of permits currently granted by the Commission is two years.

uses of the river. Municipality A therefore files for an amendment to its permit describing the site. However, before the Commission acts on the application for amendment, Municipality B files for a permit describing the same project. If, for any reason, the minority would deny Municipality A's application for amendment to its permit, then the flexibility the minority concedes is required by permittees is not achieved.

Rather than assuming this position, it seems safe to conclude that the minority, having urged the filing of amendments, would grant them. Thus, the minority would grant A's application for amendment to its permit and deny B's application for permit. As Commissioner Black states: "An applicant would obviously be entitled to routine approval of an amendment to his permit. . . ."

The full significance of this approach becomes apparent when A is not a municipality but a non-preference body such as a co-op. Again, we assume that Co-op A was granted a two-year permit,

29120

describing project 1 which would develop given reach of the river X-Y. Immediately after the grant, A conducts studies of X-Y and confers with the several interested federal and state agencies concerned with water development, as required by the specific terms of the permit. As a result, it becomes apparent one year later that site 2, 500 feet downstream, in addition to other engineering changes would best develop reach of the river X-Y. So, according to the Minority, Co-op A would file for an amendment. Before the Commission acts on A's application for amendment, Municipality B files an application for a permit, describing the same project as that identified by A in A's application for amendment. Thus, the Commission has two mutually exclusive applications before it.

Section 7(a) of the Power Act requires the Commission to give preference to municipalities in granting applications for permits. And here is the rub. Which application would the minority grant: A or B's? If, for *any* reason, the minority would not grant A's application, it would not give permittees the flexibility and encouragement it states is required. However, the only way the minority could grant A's application without violating the flat command of Section 7(a) is to hold that A's priority and consequently its flexibility derives from its original permit. But if A's flexibility derives from its initial permit, why all the fuss about filing for amendments?

Thus, the only difference between our position and that of the minority is that the latter would insist on paper filings of extremely dubious significance.

WPPSS also argues that our decision would deprive it of statutory notice so it would be unable to exercise its preference rights.[12] Since at least 1954, WPPSS and its predecessor in interest, the Northwest Public Power Association have actively participated in all of the proceedings involving this reach for the purpose of advocating the advantages of Nez Perce over alternative sites on the Snake. At the public hearings held in Lewiston, Idaho on the preliminary report in S.D. 51,[13] then proposing what is now High Mountain Sheep, Mr. Gus Norwood, Executive Secretary of the Northwest Public Power Association, filed a protest because High Mountain Sheep would pre-empt Nez Perce. He did the same thing when PNPC filed its application for preliminary permit, and intervened for the purpose of

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12 See also dissent, p. 12.

13 Senate Document 51, June 14, 1955, comprises a report of the Corps of Engineers on its studies of the Middle Snake River, in which it recommends construction of a dam at the Mountain Sheep site in contrast with the Nez Perce site.

again urging Nez Perce during the previous hearings on the Mountain Sheep-Pleasant Valley license proceedings. As pointed out by the Examiner herein, the managing director of WPPSS testified:

> "I am sure had [PNPC] . . . seen fit to make a filing on the Nez Perce project, in my opinion the public agencies wouldn't have made a filing on the Nez Perce project." (Tr. 4448)

29121

WPPSS was never really misled or deprived of notice. To the contrary, WPPSS knew exactly what was going on but apparently had to change horses in midstream. Its early interest was directed to promoting the Nez Perce site, assuming all the while that Interior would undoubtedly want to construct the project or, at the very least, could be induced into it. When WPPSS realized that it would not be bailed out by Interior and that the grains of sand were running short, then it became necessary for WPPSS to change its strategy. It therefore entered a claim for Nez Perce. Only after that hearing concluded did WPPSS come to realize that the preservation of the fish runs on the Salmon River would unquestionably be the determining factor in the case and preclude construction of the Nez Perce. Only at that late stage did WPPSS take its pride in hand and assert a claim preference for the HMS site, distasteful as it must have been—and still is—to its concept of what is the proper development of this reach of the river. We have no sympathy for WPPSS's alleged deprival of notice.

In addition, WPPSS criticizes our reliance upon the legislative history of the Water Power Act with respect to land withdrawals as explaining why FPC permits describe specific projects. WPPSS erroneously states that Congress was unconcerned with the extent of land withdrawals in its consideration of the Water Power Act.

(29121)

The legislative history is to the contrary. Mr. Raker stated:

> "The committee and those who appeared before the committee had this in view, that while we want to conserve the public domain and the public property for uses that might be made for the purpose of developing hydroelectric power in all its forms for ditches, houses, plants or reservoirs, it should be done, but at the same time we are beginning to realize that a reservation simply to mark imaginary lines around a large tract of land and saying that is conservation, but not using it, means nothing. It is absurd; it is ridiculous." [14]

29122

Mr. Mondell criticized land withdrawals:

> "We have a lot of lands withdrawn for water-power purposes. In the nature of things they could not have been withdrawn very intelligently, because they were withdrawn hurridly. The best lands for the development of water power were not always withdrawn. That was not with intent; that was out of ignorance. Other lands were withdrawn simply because they lay along streams, and without much regard to the possibility of power development. The withdrawals were wise and otherwise—and largely otherwise." [15]

Still later, we read:

> "I can see a man filing an application in my district covering a million acres under this law whereby every improvement on that land in the way of future home-

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[14] Cong. Rec.—House, August 20, 1914, Vol. 51, p. 14062.

[15] 65th Cong., 2nd Sess., Hearings, House Committee on Water Power, May 13, 1918, p. 624.

steading, future desert-land entries, future mining entries, would be absolutely blocked until the land was released by the commission or by Congress. I can see myself working here for the next 40 years in getting homestead and desert-land claims and mining claims released from this kind of application for the good, honest citizens of this country who want to go there and and live and develop it as they ought to.

* * * * *

(Mr. Johnson) The gentleman from California [Mr. Raker] is quite right. We have tied up too much." [16]

Congress was concerned with undue land withdrawals and clearly expressed its concern. In the light of this history, it is not surprising that the Commission historically has followed a policy of requiring the filing of applications for permits to describe a project with particularity. Since, under § 24 of the Act, a reservation is automatically effected by filing for a permit, the Commission's continuous practice in this regard represents a satisfactory compromise between the necessity to preserve valuable power sites and the need to make valuable land areas available for public entry.

29123

WPPSS also quarrels with our findings as to the power requirements of WPPSS and PNPC. WPPSS does not contest our finding that PNPC will have a need for the power by the time HMS is constructed. To the contrary, WPPSS recognizes PNPC's deficiency and suggests that PNPC must find some manner of offsetting this deficiency during the period HMS is being constructed. We agree. However, we are confident that PNPC will find some satisfactory method of serving its customers in the interim

[16] *Cong. Rec.—House*, Sept. 5, 1918, Vol. 56, p. 10035.

period. In view of this situation and because our selection of PNPC is based on its priority, it is unnecessary to treat this matter further. It is sufficient for us to note that WPPSS has failed to show we made any material error in this area.[17]

WPPSS complains that we have ignored the difference between its proposal for HMS and that of PNPC. This is incorrect. However the differences between the two proposals are of such a technical engineering nature that they must await the submission of final plans. It is impossible at this point to determine the precise nature of the project which will eventually be constructed at HMS. We recognized this situation in our decision. On page 5, we stated that a complete geological study carried out by a more elaborate program of borings is required before construction can be authorized at any HMS site. On page 9 we noted that final plans may differ from what we characterized as the estimates submitted herein. We therefore specifically refused to find that the data submitted respecting these plans precisely represent the ultimate development of either plan. In order to assure that the complete potential of this reach of the river is fully developed by PNPC, i.e., that development required by Section 10(a) of the Act, we specifically included Article 39 through 44 in the license.

However, to avoid any possible ambiguity, we are modifying our order to describe the project works at the HMS site; which, on the basis of present information, we find

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[17] WPPSS currently notes that, on the basis of average energy resources during the winter control storage period, as shown by the record, with the addition of the Wells and Hanford projects, PNPC might not require all of the HMS energy until 1969-1970. WPPSS also points out correctly, contrary to our statement that it does not own or operate any electric facilities, that since the close of the record it has constructed the Packwood Project (No. 3244) with 26,000 KW of normal capacity and has under construction steam generating facilities associated *with* the Hanford nuclear project.

to be best adapted to a comprehensive plan of development under the test set forth in Section 10(a) of the Act.

29124

All three applicants for rehearing have requested a stay of our opinion and order granting a license to PNPC pending appeal. Under Section 313(a) of the Federal Power Act a stay does not result automatically from the filing of application for rehearing. In *Virginia Petroleum Jobbers* v. *F.P.C.*, 259 F. 2d 921 (CADC 1958) the court prescribed four tests which must be satisfied in order to justify a stay of an administrative order: (1) Petitioner must be likely to prevail on the merits; (2) petitioner will be irreparably injured;[18] (3) Issuance of the stay will not substantially harm other interested parties; and (4) The public interest would not be adversely affected.[19]

Treating these tests in reverse order, we have unanimously found that HMS power certainly will be required by the time construction is completed. Thus, any postponement would be injurious to the public interest. PNPC, particularly, has an urgent need for the power and our refusal to allow it to proceed with its plan to construct this economical project would clearly be to its economic disadvantage. On the other hand, WPPSS has singularly failed to allege *any* injury to it resulting from a refusal to stay, much less irreparable injury. Finally, for the

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[18] As to this element, the court stated: "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." 259 F. 2d 925

[19] "In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial." *Ibid.*

reasons stated herein and in our original opinion, we believe that our decision will be affirmed if appealed.

In addition, it is significant that PNPC will not begin actual construction of HMS until completion of additional studies required by our order. Article 42, as amended, provides:

> The Licensee shall submit, in accordance with the Commission's rules and regulations, revised Exhibit L drawings and Exhibit M for the project structures and Licensee shall not begin construction of the project works until the Commission approves the exhibit.

These activities will not be completed before our order becomes subject to the jurisdiction of the court, and thus would not preclude the use of the site by another party. There is no reason to fear that a federal court would distort its judgment because of these investigative activities, particularly since PNPC would be proceeding at its own risk.

PNPC on March 16, 1964, filed a motion to strike the application for rehearing filed by WPPSS on the ground that it was not filed under oath in accordance with Section 1.34(a) of the Commission's rules, and filed a similar motion to strike the application of the Department of the Interior for this reason and for the further reason that under the Commission's order of December 14, 1962 the Secretary is a limited participant and was not authorized to file a petition for rehearing. Verifications for the two applications were filed on March 16, 1964, and, while this was not in strict conformity to our rules, our Secretary by accepting the applications for rehearing properly waived the failure to make the filings under oath in accordance with

his authority delegated by Section 3.5 (9) of the Rules. In this connection, our order of December 14, 1962 was intended to permit the Department of the Interior to participate in the remaining procedural steps in this case. Accordingly, that order does not limit Interior in contesting the order adopted.

The Commission further finds:

The applications and motions hereinabove described present no new facts or principles of law which warrant any change in the order of February 5, 1964, except to the extent noted in ordering paragraph (A) below.

29126

The Commission orders:

(A) The Commission's order entered in this matter on February 5, 1964 is modified in the following respects:

(i) Paragraph (A)(ii) is amended to read as follows:

All project works consisting of a concrete arch dam approximately 670 feet high, creating a reservoir extending about 58 miles upstream to Hells Canyon tailwater (Project No. 1971) on the Snake River and about 10 miles upstream on the Imnaha River with normal water surface area of about 17,300 acres and gross storage capacity of 3,600,000 acre-feet at normal water surface elevation 1510, of which 2,250,000 acre-feet would be usable with a draw down of 173 feet; a chute-type radial-gate controlled spillway located at the right abutment; low level intakes; an outdoor type powerhouse, immediately downstream of the dam, having an initial installation of six units with each turbine rate 321,000 horsepower at 550-foot head and each generator rated 200,000 kw (210,000 kva at 0.95 power factor); with provisions in the plans for the addition of four additional units, and appurtenant electrical and mechanical

facilities; the location, nature, and character of which are subject to the Commission's approval under Article 42.

(ii) Article 14 is amended to read as follows:

The licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other power systems and in such manner including the construction of additional transmission facilities as the Commission may direct in the interest of maximizing power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the license as the Commission may order.

29127

(iii) Article 42 is amended to include "and Exhibit M" after the word drawing in the second line.

(iv) Article 51 is amended to eliminate the last sentence.

(v) Article 56 a. is amended by changing "1,166,700" to "1,600,000" in the fourth line.

(B) The applications for rehearing and for stay filed by WPPSS, the Secretary of the Interior, and the Department of Conservation of the State of Washington are hereby denied.

(C) The motions of PNPC to strike the applications for rehearing filed by the Secretary of the Interior and WPPSS are hereby denied, except to the extent heretofore described.

(D) In acknowledgment of the acceptance of this license, it shall be signed for the licensee and returned to the Commission within 60 days from the date of the issuance of this order.

By the Commission: Chairman Swidler and Commissioner Black dissenting.

Commissioner Black filed a dissenting statement appended hereto.

GORDON M. GRANT
Acting Secretary

(Seal)

29128

IN TESTIMONY of its acknowledgment of acceptance of all the provisions, terms and conditions of the Commission's license order issued February 5, 1964 in Project No. 2243, as amended by this order on rehearing, *Pacific Northwest Power Company*, this .... day of ....., 19...., has caused its corporate name to be signed hereto by ....., its ..... President, and its corporate seal to be affixed hereto and attested by ....., its ..... Secretary, pursuant to a resolution of its Board of Directors duly adopted on the ... day of ....., 1964, a certified copy of the record of which is attached hereto.

PACIFIC NORTHWEST POWER COMPANY

By .....
President

Attest:

.....
Secretary

(Executed in quadruplicate)

29129

Project No. 2243
PACIFIC NORTHWEST POWER COMPANY

Project No. 2273
WASHINGTON PUBLIC POWER SUPPLY SYSTEM

(Issued April 30, 1964)

BLACK, Commissioner, *dissenting:*

I dissent to the majority's order on rehearing for the reasons already stated in the dissenting opinion to the licensing decision of February 5, 1964.

The Commission's rather labored defense of its position presents nothing new and does not require any extended restatement of the views expressed by the Chairman in which I have concurred. The majority neglects for the most part even to discuss the competing applications with which we are concerned and the principles of law which apply to the facts before us. Instead, we are treated to a little fantasy in which hypothetical parties are engaged in a controversy unrelated to the case at issue. This Commission can strain with its A's and B's, its X's and Y's, its fictitious municipalities and co-ops, and move its fanciful projects 500 feet up and down stream until the Salmon and Snake Rivers both begin flowing uphill; for the fact situation posited by the majority completely misses the point. Here PNPC did not seek to change its Low Mountain Sheep-Pleasant Valley project as a result of site explorations. It applied for HMS, because the Commission rejected its license application for the LMS-PV project. An applicant would obviously be entitled to routine approval of an amendment to his permit, in appropriate cases, where his exploration at the project site indicated that changes in the project were desirable.

Try as they will by discussing cases which are not before us, my colleagues of the majority cannot change the facts that (a) the Commission had precisely defined the scope of PNPC's preliminary permit; (b) PNPC's license application within the scope of that permit was denied by the Commission; (c) only after the expiration of the preliminary permit originally issued in this docket did PNPC conduct the necessary investigations to support this new site; and (d) WPPSS is a preference entity under Section 7(a) of the Federal Power Act which provides that "the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region."

These factors are dispositive of the case; but lest silence on the remaining aspects of this controversy might imply that the minority no longer adheres in toto to its position, it should be restated that (a) the effect of the preliminary permit issued PNPC terminated upon the Commission's denial of its original license application and (b) PNPC failed in any event to perfect its application for the High Mountain Sheep project within the three-year statutory limit. No useful purpose would be served by repeating here the arguments which support these positions already set forth at length in the Chairman's dissent to the February 5 order and opinion.

I also dissent to the Commission's refusal to grant a stay of the order pending appeal. As the Supreme Court has stated, the granting of stay "is an exercise of judicial discretion. The propriety of its issue is dependent

upon the circumstances of the particular case.'"[1] The case cited by the majority, involving an issue of the right of competing fuel interests to intervene in certificate cases arising under the Natural Gas Act, is not in point. Further, it relates to the standards applicable to judicial stay of administrative actions which are not the same as the standards which administrative bodies must apply to their own decisions. At any rate, we should note the Court's observation that "injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits."[2] Surely we can take into account the fact that difficult and closely controverted questions of law of the most far reaching significance are presented by and go to the very heart of this case.

To grant a stay does not constitute an admission of error—it only bespeaks a certain degree of caution and prudence which it might behoove this Commission to exercise. The majority implicitly acknowledges that the review process may not be completed before construction would normally commence and that a stay would delay construction. However, if the wrong party moves in and begins development of the site or otherwise incurs costs associated with such development

our problems are greatly complicated in the event of a remand by the court. More importantly, by failing to stay the effect of the order, we are permitting and encouraging the expenditure of perhaps large sums of money which will be reflected in the cost of service of those utility companies comprising PNPC. This result is hardly protective

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[1] *Scripps Howard Radio* v. *FCC*, 316 U.S. 4, 10, 11; 86 Lawyers edition 1229, 1234.

[2] *Virginia Petroleum Jobbers Association* v. *FPC*, Op. Cit., page 925.

of the public interest. I feel strongly that we should do everything in our power to preserve the status quo until the strenuously contested legal issues in this case are properly disposed of by the courts. The damage to the parties and to the public interest which will result from premature construction activities, should this case be remanded to the Commission, in my opinion greatly outweighs the detrimental effect of delay pending judicial review.

Chairman Swidler joins in these views.

DAVID S. BLACK
David S. Black, *Commissioner*

29132

(This document is an Errata Sheet to Opinion No. 418-A, and the four corrections indicated have been made in the Opinion text and the Errata Sheet is therefore omitted from printing.)

30003

[Docketed December 14, 1954]

Advertising Order

Project No. 2173

No. 29

100-2 Formal

U. S. FEDERAL POWER COMMISSION, Washington, D. C.

December 14, 1954

The Publisher of WALLOWA COUNTY CHIEFTAIN
Enterprise, Oregon

AUTHORITY TO ADVERTISE
Date 2-15-49
No. FPC Order

Sir:

You are hereby authorized to publish the enclosed advertisement relating to application for preliminary for proposed Project No. 2173, filed by Pacific Northwest Power Co., of Portland, Ore. to be set solid, without paragraphing, and without any display in the heading unless otherwise expressly authorized in the specifications attached to the advertisement, in the regular edition of your paper, four times, December 30, 1954 and January 6, 13, and 20, 1955 provided your rates are not in excess of the commercial rates charged to private individuals, with the usual discounts. Please complete and return the inclosed acknowledgment card.

Respectfully,

EARL F. SECHREST
Earl F. Sechrest, Chief

Title Division of Budget and Finance

Your bill for this service should be rendered upon the voucher form printed on the reverse hereof immediately after the last insertion of the advertisement. The voucher, together with affidavit of publication, should be addressed to

Federal Power Commission, Washington 25, D. C.

IMPORTANT

Charges for advertising when a cut, matrix, stereotype, or electrotype is furnished will be based on actual space used and no allowance will be made for shrinkage.

In no case shall an advertisement extend beyond the date and edition herein named for publication.

30004

[Docketed December 14, 1954]

Advertising Order

Project No. 2173

No. 28

100-2 Formal

U. S. FEDERAL POWER COMMISSION, Washington, D. C.

December 14, 1954

The Publisher of IDAHO COUNTY FREE PRESS
Grangeville, Idaho

AUTHORITY TO ADVERTISE
Date 2-15-49
No. FPC Order

Sir:

You are hereby authorized to publish the enclosed advertisement relating to application for preliminary permit for proposed Project No. 2173, filed by Pacific Northwest Power Co., Portland, Ore. to be set solid, without paragraphing, and without any display in the heading unless otherwise expressly authorized in the specifications attached

(30004)

to the advertisement, in the regular edition of your paper, four times, on December 30, 1954 and January 6, 13, and 20, 1955 provided your rates are not in excess of the commercial rates charged to private individuals, with the usual discounts. Please complete and return the inclosed post card acknowledgment.

Respectfully,

EARL F. SECHREST
Earl F. Sechrest, Chief

Title Division of Budget and Finance

* * * * * * * * * * *

Your bill for this service should be rendered upon the voucher form printed on the reverse hereof immediately after the last insertion of the advertisement. The voucher, together with affidavit of publication, should be addressed to

Federal Power Commission, Washington 25, D. C.

IMPORTANT

Charges for advertising when a cut, matrix, stereotype, or electrotype is furnished will be based on actual space used and no allowance will be made for shrinkage.

In no case shall an advertisement extend beyond the date and edition herein named for publication.

30005

FEDERAL POWER COMMISSION, Washington 25, D. C.

Public notice is hereby given that application has been filed under the Federal Power Act (16 U.S.C. 791a-825r) by Pacific Northwest Power Company, of Portland, Oregon, for preliminary permit for proposed Project No. 2173, consisting of two proposed water-power developments designated as Mountain Sheep and Pleasant Valley, to be located on Snake River in Idaho County, Idaho, and Wallowa

County, Oregon, affecting lands of the United States within Wallowa, Weiser and Nez Perce National Forests, and described respectively as: Mountain Sheep, comprising a concrete arch dam with top elevation of about 1108 feet (m.s.l.) located at river mile 192.6 in SE¼ Sec. 30, T. 29 N., R. 3 W., B. M., Idaho, and SE¼ Sec. 18, T. 4 N., R. 49 E., W. M., Oregon, creating a reservoir extending about 20.6 miles to the Pleasant Valley site; a powerhouse with provisions for installation of 250,000 kilowatts of generating capacity; and appurtenant facilities; and Pleasant Valley, comprising a concrete arch dam with top elevation of about 1475 feet (m.s.l.) located at river mile 213.2 in NW¼ Sec. 29, T. 27 N., R. 1 W., B. M., Idaho, and SW¼ Sec. 17, T. 2 N., R. 51 E., W. M., Oregon, creating a reservoir extending about 34 miles to Hells Canyon dam site containing about 850,000 acre-feet of storage capacity of which about 300,000 acre-feet will be usable for power, flood control, and other beneficial uses; a powerhouse with provisions for installation of 600,000 kilowatts of generating capacity; and appurtenant facilities. Protests or petitions to intervene may be filed with the Federal Power Commission, Washington 25, D. C. in accordance with the Rules of Practice and Procedure of the Commission (18 C.F.R. 1.8 or 1.10), the time within which such petitions must be filed being specified in the rules. The last day upon which protests may be filed is February 3, 1955. The application is on file with the Commission for public inspection. Leon M. Fuquay, Secretary.

Order for four publications to be made on December 30, 1954 and on January 6, 13, and 20, 1954.

Given to:

IDAHO COUNTY FREE PRESS, Grangeville, Idaho 443845

WALLOWA COUNTY CHIEFTAIN, Enterprise, Oregon 443846

30006

(Filed December 21, 1954)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Project No. 2173

In the Matter of

PACIFIC NORTHWEST POWER COMPANY

December 16, 1954

Notice of Application for Preliminary Permit

Public notice is hereby given that application has been filed under the Federal Power Act (16 U.S.C. 791a-825r) by Pacific Northwest Power Company, of Portland, Oregon, for preliminary permit for proposed Project No. 2173, consisting of two proposed water-power developments designated as Mountain Sheep and Pleasant Valley, to be located on Snake River in Idaho County, Idaho, and Wallowa County, Oregon, affecting lands of the United States within Wallowa, Weiser and Nez Perce National Forests, and described respectively as: Mountain Sheep, comprising a concrete arch dam with top elevation of about 1108 feet (m.s.l.) located at river mile 192.6 in SE¼ Sec. 30, T. 29 N., R., 3 W., B. M., Idaho, and SE¼ Sec. 18, T. 4 N., R. 49 E., W. M., Oregon, creating a reservoir extending about 20.6 miles to the Pleasant Valley site; a powerhouse with provisions for installation of 250,000 kilowatts of generating capacity; and appurtenant facilities; and Pleasant Valley, comprising a concrete arch dam with top elevation of about 1475 feet (m.s.l.) located at river mile 213.2 in NW¼ Sec. 29, T. 27 N., R. 1 W., B. M., Idaho and SW¼ Sec. 17, T. 2 N., R. 51 E., W. M., Oregon, creating a reservoir extending about 34 miles to Hells Canyon dam site containing about 850,000 acre-feet of storage capacity

of which about 300,000 acre-feet will be usable for power, flood control, and other beneficial uses; a powerhouse with provisions for installation of 600,00 kilowatts of generating capacity; and appurtenant facilities.

30007

Protests or petitions to intervene may be filed with the Federal Power Commission, Washington 25, D. C., in accordance with the Rules of Practice and Procedure of the Commission (18 C.F.R. 1.8 or 1.10), the time within which such petitions must be filed being specified in the rules. The last day upon which protests may be filed is February 3, 1955. The application is on file with the Commission for public inspection.

LEON M. FUQUAY
Leon M. Fuquay,
Secretary.

30021

[Docketed April 6, 1955]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Seaborn L. Digby and Frederick Stueck.

In the Matter of

PACIFIC NORTHWEST POWER COMPANY
Project No. 2173

Order Issuing Preliminary Permit

Application was filed November 9, 1954 by Pacific Northwest Power Company, of Portland, Oregon, for a preliminary permit under the Federal Power Act (hereinafter

referred to as the act) for proposed Project No. 2173, to be located on Snake River, navigable waters of the United States, in Idaho County, Idaho, and Wallowa County, Oregon, and affecting lands of the United States within Wallowa, Weiser and Nez Perce National Forests.

As described in the application, the proposed project would consist of two water-power developments designated as Mountain Sheep and Pleasant Valley and described respectively as:

(a) *Mountain Sheep* consisting of a concrete arch dam with a top elevation of approximately 1108 feet (m.s.l.) located at river mile 192.6 in SE¼ Sec. 30, T. 29 N., R. 3 W., B.M., Idaho, and SE¼ Sec. 18, T. 4 N., R. 49 E., W.M., Oregon, creating a reservoir extending about 20.6 miles to the Pleasant Valley site; a powerhouse with provision for installation of 250,000 kilowatts of generating capacity and appurtenant facilities, and

(b) *Pleasant Valley* consisting of a concrete arch dam with a top elevation of approximately 1475 feet (m.s.l.) located at river mile 213.2 in NW¼ Sec. 29, T. 27 N., R. 1 W., B.M., Idaho, and SW¼ Sec. 17, T. 2 N., R. 51 E., W.M., Oregon, creating a reservoir extending about 34 miles to Hells Canyon dam site containing about 850,000 acre-feet of storage capacity of which about 300,000 acre-feet will be usable for power, flood control, and other beneficial uses; a powerhouse with provision for installation of 600,000 kilowatts of generating capacity and appurtenant facilities.

The energy generated by the proposed project is expected to be distributed through the transmission facilities of the Northwest Power Pool to the four companies (The Montana Power Company, The Washington Water Power Company, Pacific Power & Light Company, and Portland

General Electric Company) controlling the applicant company and then distributed through their separate systems for domestic, commercial and industrial purposes.

30022

In reporting on the application, the Department of the Army has advised, among other things, that studies currently under review by the Departments of the Interior and of the Army indicate that about 500,000 acre-feet of power drawdown and flood control storage would be desirable in the Pleasant Valley Reservoir if the high Hells Canyon project is not constructed, and that in view of the importance of obtaining flood control storage in the development of the water resources of the Columbia River and tributaries, the Corps of Engineers desires further opportunity to review this phase of the applicant's plans when more information becomes available. The Department of the Army offers no objection to the granting of a preliminary permit to the applicant.

The Chief, Forest Service, acting for the Secretary of Agriculture, who has supervision over the Wallowa, Weiser and Nez Perce National Forests, has reported favorably on the application as hereinafter provided.

An Assistant Secretary of the Interior, in reporting on the application, has pointed out, among other things, that:

(a) According to the U. S. Fish and Wildlife Service, the two proposed dams would impair passage of valuable runs of anadromous fish which spawn in the Snake River and its tributaries above the Salmon and Imnaha Rivers, and the Service estimates that the total cost of studies by Federal and State agencies needed to determine the extent of the fisheries problem and feasible means for mitigating losses would be not more than $250,000. Accordingly, the Assistant Secretary recommends that in the interest of con-

servation of fish and wildlife resources, any preliminary permit issued should include a provision substantially as hereinafter provided;

(b) The National Park Service believes that the impounded waters of the two dams will have definite recreational potentialities, and requests that any permit issued should include a provision substantially as hereinafter provided;

(c) The Bureau of Mines has reported that the area of the proposed project may be mineralized to a considerable extent, and recommends that any permit issued should include a provision substantially as hereinafter provided; and that

(d) Interests of other agencies of the Department of the Interior will not be adversely affected by the issuance of a preliminary permit for the proposed project.

30023

The Governor of Idaho and State of Idaho Reclamation Engineer, respectively, have reported favorably on the application. The Idaho Department of Fish and Game has reported on the application, as have the Oregon State Game Commission, the Fish Commission of Oregon, and the Department of Fisheries and the Department of Game of the State of Washington.

Federal plans for development of the two power sites as initially investigated by the Corps of Engineers and the Bureau of Reclamation indicate that the proposed project has engineering feasibility and would provide benefits from power, flood control, navigation and other interests. Since the two developments would be located immediately downstream from the Hells Canyon site, the costs, operation, and characteristics of certain features of the two dams

will depend upon the ultimate development of the Snake River at and above the Hells Canyon site. Consequently, the permit should contain a condition requiring cooperative studies with the Corps of Engineers and the Bureau of Reclamation in order to determine the best plan of development.

The permit issued herein does not authorize construction of the proposed project—being for the sole purpose of maintaining priority of application for a license for the project under the terms of the Federal Power Act.

The Commission *finds:*

(1) The applicant is a corporation organized under the laws of the State of Oregon, and is qualified to do business in the States of Washington and Idaho.

(2) The project will be located on navigable waters of the United States and will occupy lands of the United States within the Wallowa, Weiser and Nez Perce National Forests.

(3) Public notice of the application has been given as required by the Federal Power Act. No conflicting application is before the Commission. However, an informal protest against the application was received from Northwest Public Power Association, Inc.

(4) The proposed project would not affect any Government dam, and no reason is apparent at this time for its development by the United States.

The Commission *orders:*

(A) This preliminary permit is issued to Pacific Northwest Power Company, of Portland, Oregon (hereinafter refered to as the Permittee), for a period of three years,

effective as of April 1, 1955, for the sole purpose of maintaining priority of application

for a license for Project No. 2173 to be located upon navigable waters of the United States and affecting lands of the United States, subject to the terms and conditions of the Act, which is incorporated by reference as a part of this permit, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(B) This permit is also subject to the terms and conditions set forth in Form P-1, entitled "Terms and Conditions of Preliminary Permit", which terms and conditions (described as Articles 1 through 8) are attached hereto and made a part hereof; and subject to the following special conditions set forth herein as additional articles:

Article 9. The permittee shall submit at the close of each sixth-month period from the effective date of the preliminary permit to the Commission's Regional Engineer, San Francisco, California, or to such other officer as the Commission may designate, accurate statements of the work accomplished during the period and of the work contemplated under the preliminary permit for the ensuing period.

Article 10. The Permittee shall cooperate with the U. S. Forest Service during the period of this permit to develop a plan for alleviation of damage to and achieving maximum utilization of National Forest resources insofar as affected by the proposed project.

Article 11. The Permittee shall, during the period of this permit, cooperate with the U. S. Fish and Wildlife Service, the Fish Commission of Oregon, the Oregon State Game Commission, and the Idaho Department of

Fish and Game in formulating mitigation measures for inclusion in the project in the interest of fish and wildlife conservation.

Article 12. The Permittee shall, during the period of this permit, negotiate with the U. S. Fish and Wildlife Service, the Fish Commission of Oregon, the Oregon State Game Commission, and the Idaho Department of Fish and Game for the performance of the necessary studies in the interest of conservation of fish and wildlife resources and payment of the costs thereof; *Provided, however,* That in the event the Permittee and the agencies named herein fail to reach an agreement as contemplated herein, the Commission may, after notice and opportunity for hearing, determine the scope of the studies and the amount the Permittee shall pay to reimburse the agencies involved for such studies.

Article 13. The Permittee shall, during the period of this permit, cooperate with the Department of Public Lands of the State

of Idaho, the State Parks Department of the Oregon State Highway Commission, the National Park Service, and the U. S. Forest Service regarding the recreational phases of the project.

Article 14. The Permittee shall, during the period of this permit, cooperate with the Bureau of Mines in regard to a study of the mineral resource possibilities of the area affected.

Article 15. The Permittee shall, during the period of this permit, cooperate with the U. S. Corps of Engineers and the Bureau of Reclamation with the object of determining a plan of development for the two sites best adapted to a comprehensive plan of development of the water resources of the Snake River.

(C) This order shall become final thirty (30) days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313 (a) of the Act, and failure to file such an application shall constitute acceptance of this preliminary permit. In acknowledgment of the acceptance of this preliminary permit, it shall be signed for the Permittee and returned to the Commission within sixty (60) days from the date of issuance of this order.

By the Commission.

LEON M. FUQUAY
Leon M. Fuquay,
Secretary.

Adopted: April 6, 1955
Issued: April 8, 1955

30025.1

IN TESTIMONY OF ACCEPTANCE of all the provisions, terms, and conditions of this preliminary permit, Pacific Northwest Power Company, this ... day of ....., 19..., has caused its corporate name to be signed hereto by ...., its ..... President, and its corporate seal to be affixed hereto and attested by ....., its ..... Secretary, pursuant to a resolution of its Board of Directors duly adopted on the ... day of ....., 19..., a certified copy of the record of which is attached hereto,

PACIFIC NORTHWEST POWER COMPANY

By .....
President

ATTEST:

.....
Secretary

(Executed in quadruplicate)

30029

[Docketed April 25, 1955]

FEDERAL POWER COMMISSION
WASHINGTON 25

April 25, 1955

Mr. B. R. Kennedy
Director
The Federal Register
Room 401, The National Archives
Washington, D. C.

Re: The Cincinnati Gas & Electric Company
Docket No. E-6609

Tennessee Gas Transmission Company
Docket No. G-8215

Packwood Electric Co., a corp.
Project No. 1289

Glancy Warden Cole and Shoshone River Power, Inc.
Project No. 2011

The Montana Power Company
Project No. 2109

Pacific Gas and Electric Company
Project No. 2118

Rhinelander Paper Company
Project No. 2161

Pacific Northwest Power Company
Project No. 2173

Dear Sir:

There are enclosed an original and three certified copies each of the Notices in the above-entitled matters.

Please publish these notices in the Federal Register.

(30029)

It is considered that the enclosed notices fall within Category 4, 1 CFR 1.202.

Very truly yours,

LEON M. FUQUAY
Secretary.

Enclosures

cc: Mr. B. R. Kennedy
SE:11—4/22/55

30030

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Project No. 2173

In the Matter of

PACIFIC NORTHWEST POWER COMPANY

April 22, 1955

Notice of Order

Notice is hereby given that on April 8, 1955, the Federal Power Commission issued its order adopted April 6, 1955, issuing preliminary permit in the above entitled matter.

LEON M. FUQUAY
Secretary.

30032

[Docketed December 23, 1955]

PACIFIC NORTHWEST POWER COMPANY
P. O. DRAWER 1445
SPOKANE 10, WASHINGTON

December 3, 1955

Mr. Lesher S. Wing
Regional Engineer
Federal Power Commission
555 Battery Street
San Francisco, California

Subject: Progress Report No. 1
Project 2173—Idaho

Dear Mr. Wing:

Your letter of November 16 called our attention to the fact that we had overlooked the regular permittee's progress report on Project 2173—Idaho, which was due October 1, 1955. This will constitute such a report for this project.

On September 6, 1955, we applied to the Federal Power Commission for a license on Project 2173. This application with the attendant exhibits presents a detailed picture of the work which we have done in evaluating the *Mountain Sheep-Pleasant Valley Hydro-Electric Project.* Our subsequent correspondence with your office has referred to a number of back-up reports which further identify the parties which have carried out our exploration and design work and express in further detail the extent to which we have examined this project.

In addition to field work consisting of geologic examinations, drilling and mapping at each site, we have made studies on the present and future power market situation,

river flow and power output studies, transmission system requirements including an extensive a-c network board study, and investigations of the economics of producing power from these developments.

Up until the time of application for license, approximately $1,255,000 had been expended by us for exploration, design and preparation of the

application for license of the Mountain Sheep—Pleasant Valley Project.

Since applying for the license, we have been continuing with the necessary engineering and legal work required for the proper presentation of our application before the Federal Power Commission in case a hearing should be required. Coincident with the work being done on hearing preparation, we are financing cooperative studies by the fish and wild-life groups looking toward a solution of these problems. The United States Bureau of Mines has completed a field examination of the basin areas of both developments, and an archeological examination of the areas to be flooded will also be completed early in December.

The camp which was installed at Pleasant Valley to house the exploration crews has been kept open as a base of operations for these various groups.

Very truly yours,

A. B. MARTIN
A. B. Martin
Management Coordinator

ABM:md

30034

[Docketed April 6, 1956]

PACIFIC NORTHWEST POWER COMPANY
P. O. DRAWER 1445
SPOKANE 10, WASHINGTON

March 30, 1956

Mr. Lesher S. Wing, Regional Engineer
Federal Power Commission
555 Battery Street
San Francisco, California

Subject: Progress Report No. 2
Project 2173—Idaho, Oregon—Mountain Sheep and Pleasant Valley

Dear Mr. Wing:

The permittee of Project No. 2173—Mountain Sheep and Pleasant Valley—Idaho, Oregon—on the Middle Snake River, submits herewith its second progress report to the Federal Power Commission.

The Company has continued its studies on:

—present and future power market situation;

—river flow and power output studies;

—estimated investment and annual operating costs of this project;

—transmission system requirements including an A-C network board study.

Copies of the foregoing studies have been furnished the Commission as soon as they have been completed.

The cooperative studies of the Idaho, Oregon, Washington and United States Fish and Wildlife agencies, financed

by the Company, have continued throughout the period of this report and will continue for some period of time.

30035

A preliminary examination of the archeological occurrences has been completed and arrangements are being made for some further excavation work which was recommended in the preliminary study.

The Company has continued with the preparation of engineering and legal work needed for the Company's presentation in support of its application for a license before the Federal Power Commission should a hearing be required.

The Company plans, in the ensuing six month's period, to continue with:

—the Company studies under way but not yet completed;

—the studies of State and Federal agencies, financed by the Company, and not yet completed; and

—such other work that may be required in connection with any hearings that may be set down by the Commisison on the Company's application for a license.

Very truly yours,

W. E. PARROTT
W. E. Parrott
Secretary

WEP:md

30036

[Received October 15, 1956]

PACIFIC NORTHWEST POWER COMPANY
P. O. DRAWER 14455
SPOKANE 10, WASHINGTON

September 28, 1956

Mr. Lesher S. Wing, Regional Engineer
Federal Power Commission
555 Battery Street
San Francisco, California

Subject: Progress Report No. 3
Project 2173—Idaho, Oregon—Mountain
Mountain Sheep and Pleasant Valley

Dear Mr. Wing:

The permittee of Project No. 2173—Mountain Sheep-Pleasant Valley Hydroelectric Development—Idaho, Oregon—on the Middle Snake River, submits herewith its third progress report to the Federal Power Commission.

The Company continued its studies on:

—present and future power markets

—river flow and power output studies

—estimated investment and annual operating costs of this project

The cooperative studies of the states of Idaho, Oregon and Washington, and the United States Fish and Wildlife agencies, financed by the Company, have continued throughout the period of this report and will continue for some period of time.

(30036)

Excavation work of the archeological occurrences which was recommended in the preliminary study has now been completed and a report is in preparation.

The Company continued with the preparation of engineering and legal work and put in its direct testimony in support of its application for a license before the Federal Power Commission.

30037

The company plans, in the ensuing six month's period, to:

—continue the studies of State and Federal agencies, financed by the Company, and not yet completed;

—do such other work that may be required in connection with hearings before the Commission on the Company's application for a license; and

—start construction of the Project upon receipt of a License from the Federal Power Commission.

Very truly yours,

W. E. Parrott
W. E. Parrott
Secretary

WEP:md

30038

[Docketed April 8, 1957]

PACIFIC NORTHWEST POWER COMPANY
P. O. DRAWER 1445
SPOKANE 10, WASHINGTON

March 29, 1957

Mr. Lesher Wing, Regional Engineer
Federal Power Commission
555 Battery Street
San Francisco, California

Dear Mr. Wing:

Subject: Progress Report No. 4—Project No. 2173
Mountain Sheep-Pleasant Valley

The permitte of Project No. 2173, Mountain Sheep-Pleasant Valley Hydroelectric Development, Idaho and Oregon, on the Middle Snake River, submits herewith its fourth progress report to the Federal Power Commission.

The company's schedule of work during the past six months have including the following:

—Hearings were completed before the Federal Power Commission on the company's application for license on Project No. 2173, Briefs have been filed with the Commission by the Applicant, the Federal Power Commission Staff, and the intervenor State of Idaho for the Idaho Fish and Game Commission.

—Surveys of access roads were completed.

—Construction schedules were revised.

—Construction cost estimates as of December 3, 1956 were made.

—Estimated investment and annual operating costs were revised.

(30038)

The cooperative studies of the States of Idaho, Oregon and Washington, and the U. S. Fish and Wildlife agencies, financed by the company, have continued throughout the period of this report and will continue for some period of time.

30039

The company's work schedule for the ensuing six months include the following:

—Continuation of the studies by State and Federal agencies financed by the company and not yet completed.

—Doing such other work as may be required in connection with the company's application for license, and starting construction of the Project upon receipt of a license from the Federal Power Commission.

Very truly yours,

W. E. PARROTT
W. E. Parrott
Secretary

WEP:d

30040

PACIFIC NORTHWEST POWER COMPANY
P. O. DRAWER 1445
SPOKANE 10, WASHINGTON

September 24, 1957

Mr. Lesher Wing, Regional Engineer
Federal Power Commission
555 Battery Street
San Francisco, California

Dear Mr. Wing:

Subject: Progress Report No. 5—Project No. 2173
Mountain Sheep-Pleasant Valley

The permittee of Project No. 2173, Mountain Sheep-Pleasant Valley Hydroelectric Development, Idaho and Oregon, on the Middle Snake River, submits herewith its fifth progress report to the Federal Power Commission.

Activities during the past six months on this project have included the following:

Edward B. Marsh, Examiner, assigned the hearing on Project No. 2173, rendered his decision July 23, 1957, granting licenses.

On August 8, 1957, an extension was granted pursuant to motion of the State of Oregon, to and including September 26, 1957, within which all parties might file exceptions to said Examiner's decision.

The initial phase of the cooperative studies with the Fish and Game Departments of the states of Idaho and Oregon, and the Fisheries Department of the State of Washington were completed. Studies on river temperatures and future reservoir conditions were continued on a reduced scale with the United States Fish and Wildlife

(30040)

Services. Pacific Northwest Power Company contributed $45,000 to the construction of an artificial spawning bed by the United States Corps of Engineers at McNary Dam.

A representative of Pacific Northwest Power Company has attended all meetings of the Technical Committee working on plans and designs for fish passage facilities at Brownlee Dam. This has been done because the general plan for fish passage suggested by the United States Fish and Wildlife Service for this stretch of the Snake River will also involve the Pleasant Valley and Mountain Sheep dams if the latter are licensed.

Numerous field trips have been made by Pacific Northwest Power Company engineers and biologists undertaking other preliminary studies of possible methods of handling the fish problem on these projects.

30041

The undersigned was appointed Secretary by the Board of Pacific Northwest Power Company following the resignation of Mr. W. E. Parrott.

Very truly yours,

ROBERT D. YEOMANS
Robert D. Yeomans
Secretary

RDY:rmb

30042

PACIFIC NORTHWEST POWER COMPANY
P. O. DRAWER 1445
SPOKANE 10, WASHINGTON

September 29, 1958

AIR MAIL

Mr. Lesher Wing, Regional Engineer
Federal Power Commission
555 Battery Street
San Francisco, California
Subject: Progress Report No. 6—Project No. 2173/2243

Dear Mr. Wing:

Activities during the past twelve months on the project have included the following:

Final oral arguments concerning a license for the *Mountain Sheep-Pleasant Valley Development* were presented by all parties to the full Commission November 26, 1957, in Washington, D. C.

On January 20, 1958, the Commission issued its opinion and order denying the applicant a license to build the Mountain Sheep-Pleasant Valley Project.

Pacific Northwest Power Company filed with the Commission on February 18, 1958, an application for a rehearing and/or stay of the order. This request was denied by the Commission March 20, 1958.

Pursuant to its preliminary permit, the Company filed with the Commission on March 31, 1958, a further application for license which the Permittee refers to as the Middle Snake River Hydroelectric Project to which the Commission for identification assigned the number 2243.

(30042)

On April 18, 1958, counsel for the National Hells Canyon Association and the Northwest Public Power Association petitioned the Commission for leave to intervene in the matter of Project No. 2243, and filed an accompanying motion to dismiss the application.

30043

On June 25, 1958, applicant moved the Commission for dismissal of the petition to intervene and its accompanying motion to dismiss the application. At the same time it petitioned the Commission for issuance of a declaratory order to resolve the status of the preliminary permit.

In connection with Project No. 2173/2243, the Commission and the applicant have communicated with each other relative to engineering studies and information to be developed by the applicant, and conferences relating to these matters have been held with staff members.

Permittee, as of August 31, 1958, has made expenditures of $2,687,746.

Representatives of Pacific Northwest Power Company have maintained constant touch with activities and discussions related to fish passage problems in the region.

Because it would not be suited for further exploration under the pending application downstream, the Pleasant Valley camp will be dismantled. Removal of tents and equipment was scheduled to start September 24, 1958.

Sincerely yours,

ROBERT D. YEOMANS
Robert D. Yeomans
Secretary

RDY:rmh

30044

UKITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 307

In the Matter of

PACIFIC NORTHWEST POWER COMPANY Project No. 2173

Opinion and Order Denying Application for License

Issued: January 20, 1958

30045

UKITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of

PACIFIC NORTHWEST POWER COMPANY Project No. 2173

Opinion No. 307

Appearances

For Pacific Northwest Power Company

Allen A. Smith
Hugh Smith

For National Farmers Union, the Montana Farmers Union, Oregon Farmers Union, and Idaho State Federation of Labor

Angus McDonald

For the State of Oregon

Robert Y. Thornton, Attorney General
Arthur G. Higgs, Assistant Attorney General
Norman A. Stoll, Special Assistant Attorney General

(30045)

For National Hells Canyon Association and Northwest Public Power Association

C. Girard Davidson
Lyle R. Wolff
Joseph H. Sharlitt
Mrs. Evelyn H. Cooper
Lucien Hilmer

For Idaho Fish and Game Department

Graydon W. Smith, Attorney General
T. J. Jones, III, Assistant Attorney General

For the Staff of the Federal Power Commission

John C. Mason, Deputy General Counsel
Joseph B. Hobbs, Attorney

30046

UKITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

In the Matter of

PACIFIC NORTHWEST POWER COMPANY Project No. 2173

Opinion No. 307

Opinion and Order Denying Application for License

(Issued January 20, 1958)

There is before us upon exceptions to the presiding examiner's decision an application for a license filed under Section 4 (e) of the Federal Power Act[1] by Pacific Northwest Power Company of Portland, Oregon, for the con-

[1] 16 U.S.C. 791a-825r.

struction, operation and maintenance of a hydroelectric project, composed of the Mountain Sheep and Pleasant Valley developments, on the Snake River between Idaho and Oregon. The presiding examiner would grant a license to Pacific Northwest. Because, as will appear below, in our judgment the proposed Mountain Sheep-Pleasant Valley project is not "best adapted" to a comprehensive plan for developing the river within the meaning of Section 10 (a) of the Act, we are unable to grant a license as requested for the construction, operation and maintenance of that project.

The application for license was filed on September 7, 1955. The Commission permitted intervention by the National Hells Canyon Association, Inc., Northwest Public Power Association, Montana Farmers Union, National Farmers Union, Idaho State Federation of Labor, the Oregon Farmers Union, the State of Oregon acting through its Game Commission and Fish Commission, and the State of Idaho through its Fish and Game Commission stating that it was desirable to allow interveners to present facts and law from which the nature and validity of their alleged rights and interests might be determined. Hearings were hold in Pendleton, Oregon; Lewiston, Idaho; and in Washington, D. C., concluding on December 19, 1956. At the hearings Pacific Northwest moved that the various petitions to intervene be dismissed on a number of grounds including lack of interest in the proceeding.

On March 8, 1957, Hells Canyon Association filed a petition to reopen the record and to continue the proceeding in order to incorporate, among other things, the results of a study now under way by the United States Army

Corps of Engineers further reviewing plans for development of the Columbia River Basin, including the stretch

of the Snake River involved here. This motion was denied by the Commission on March 28, 1957, and the presiding examiner's decision was issued on July 23, 1957.

In his decision the presiding examiner discussed the features of the Applicant's proposed project and the benefits expected to flow therefrom and compared the proposed project with the alternative Nez Perce project. Although he concluded that the Nez Perce project would be an excellent development and was superior with respect to flood control, he found that the Mountain Sheep-Pleasant Valley project was best adapted to a comprehensive plan for improving and developing the middle reach of the Snake River. In addition, he concluded that development of this reach of the Snake should not be undertaken by the United States itself. With respect to the interveners he found that the Northwest Public Power Association and the Hells Canyon Association were qualified to participate in the proceeding but that the farm and labor groups were not.

Exceptions were filed to the decision by Pacific Northwest, jointly by Hells Canyon Association and Public Power Association, by the State of Oregon, by the State of Idaho and by Staff of this Commission. At the time exceptions were filed Hells Canyon Association and Public Power Association, and the State of Oregon by motion, requested delay in our decision pending further study by the Corps of Engineers and the Oregon Water Resources Board.

The Applicant, Pacific Northwest, is an Oregon corporation whose two thousand shares of common stock outstanding are owned equally by The Montana Power Company, Washington Water Power Company, Portland General Electric Company and Pacific Power and Light Company. The board of directors of Pacific Northwest is made up

of two officials of each of these four companies, which are operating utilities doing an electric power business in the northwest part of the United States. Portland General Electric serves an area in Oregon, including the cities of Salem and Portland; Montana Power serves an area almost wholly confined to the State of Montana; Washington Water Power serves customers in northern Idaho and the northeastern portion of the State of Washington; Pacific Power and Light serves areas in Oregon, Wyoming, Washington, northern Idaho, and western Montana.

The Snake River is the largest tributary of the Columbia River. The Columbia River Basin is described by the United States Army Corps of Engineers (House Document No. 531, 81st Congress, 2nd session) as the largest present producer and the largest potential source of hydroelectric power on this continent, as the primary salmon-producing stream in the United States and as carrying active barge navigation over 300 miles inland.

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At river mile 324 the Columbia is joined by the Snake which is 1073 miles in length. Arising in Wyoming, the Snake flows west across Idaho to the Oregon border, north along the border through a broad, flat valley and through Hells Canyon in a mountainous area and eventually west to enter the Columbia near Pasco, Washington. Between Hells Canyon and its confluence with the Columbia, the Snake is joined by the Imnaha, Salmon, Grande Ronde, and Clearwater River in that order. The Commission has found that "The Snake river from its junction with the Columbia River up to the mouth of Henry's Fork is a navigable water of the United States." *Idaho Power Company*, 14 F.P.C. ....., Op. No. 283, Project No. 1971, August 4, 1955. Henry's Fork is approximately at river mile 868 above the mouth of the Snake River.

The proposed Mountain Sheep dam would be located at river mile 192.8 about 4.5 miles upstream from the confluence of the Salmon with the Snake and one mile upstream from the mouth of the Imnaha. It would be a gravity type concrete dam 255 feet high to develop a head of 163 fee. The development would include a pond with a normal pool elevation at 1113 feet above sea level and with usable pondage of about 46,000 acre-feet utilizing a drawdown of 30 feet, and a powerhouse having an installed generating capacity of 282,000 kilowatts initially and 376,000 kilowatts ultimately.

The proposed Pleasant Valley dam would be constructed about 20 miles upstream from the Mountain Sheep dam and in the upper limits of the Mountain Sheep pool. It would be an arch-type concrete dam 534 feet high and would develop a head of 377 feet. The reservoir with normal pool elevation at 1490 feet would extend upstream to the low Hells Canyon site (Project No. 1971) and would have, with a drawndown of 104 feet, a usable storage capacity of 500,000 acre-feet. The powerhouse would have an installed generating capacity of 720,000 kilowatts initially and 864,000 kilowatts ultimately.

The record shows that the proposed project would be intergrated both hydraulically and electrically with the Northwest Power Pool, which is an organization made up of a number of electric power systems (including the four affiliated companies) operating in Utah, Montana, Idaho, Oregon, Washington and British Columbia. With the initial innstallation it has been estimated that the average at-site dependable capacity and the average at-site annual usable energy of the project would be 1,002,000 kilowatts and 5.31 billion kilowatt-hours, respectively; and that the average at-market dependable capacity and average at-market annual usable energy would be 923,844 kilowatts and 5.04 billion kilowatt-hours, respectively. The evidence

shows that the two dams will be stable and will fully develop the head at their respective sites and that the capacity and energy that could be produced by the proposed project could be utilized in the Pacific Northwest area as soon as it could be made available.

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It is clear from the record that the proposed project would have engineering and economic feasibility under conventional financing methods whether actual cost would be approximately equal to the cost as estimated by Applicant or by the Commission Staff.

Before a license may be issued under the Federal Power Act the project involved must be such as in the judgment of the Commission will be best adapted to a comprehensive plan of development of the water resources of the region.[2]

Whenever there is more than one possible project that in combination with others may develop the stretch of the river involved, we are authorized to grant a license only for the one which in our judgment will be "best adapted" to the purposes of Section 10 (a). Cf. *National Hells Canyon Association* v. *F.P.C.*, 237 F. 2d 777, 783, 784, (CA-DC), certiorari denied 353 U.S. 824. With respect to the comprehensive plan, it must be one that will permit development of all of the beneficial uses of the water re-

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[2] *Section 10.* All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval. [41 Stat. 1068; 49 Stat. 842; 16 U.S.C. 803]

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sources that are reasonably necessary and desirable. Both of these, of course, involve matters which are not determinable on mathematical computations alone, but require us to consider the potentialities of the particular project on the river with which we are concerned.

There is before us in this proceeding the report prepared by the Corps of Engineers of the United States Army filed with the Congress in 1948, known as House Document 531, 81st Congress, 2nd session, setting forth a broad plan for the development of water resources of the area in the interest of flood control, navigation, power, irrigation and related water uses. This plan, described in the record here as comprehensive in scope but flexible in outline, includes a system of levees and reservoirs to control the floods on the lower Columbia River to 800,000 cubic feet per second (cfs) at The Dalles, which system of levees and reservoirs has been referred to as the "Main Control Plan." It involves construction or modification of a number of projects in the Columbia River system with particular attention to flood control. Additional projects were recommended in a more recent report, dated, June 1, 1955, which appears as Senate Document No. 51, 84th Congress, 1st session.

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Since that time the Corps of Engineers has been asked to review the original report, H.D. 531, with respect to flood control, navigation, hydroelectric power and all related water uses. A resume of its preliminary findings to date has been embodied in an information bulletin attached to a notice of public hearing dated September 28, 1957. At the oral argument we were requested to take official notice of this document. As this document is preliminary in nature, and as we already have before us the previous reports supplemented by the testimony of a witness from

the Corps of Engineers, we do not believe it in the public interest to take official notice of this preliminary report. However, it would not appear that the report would alter in any material degree our findings or conclusions herein.

In presenting studies of the comparative merits of the proposed Mountain Sheep-Pleasant Valley project the Staff of this Commission developed two alternative plans for the middle reach of the Snake River between the Hells Canyon project and the sites on the Lower Snake authorized for federal development. These plans, designated "Plan I" and "Plan II", would develop the same available head and would be mutually exclusive.

Plan I would consist of a large project, known as the Nez Perce project, located at river mile 186 about 2.5 miles downstream from the mouth of the Salmon River and a potential High Asotin project located downstream from Nez Perce at river mile 151. Plan II would comprise the proposed Mountain Sheep and Pleasant Valley developments on the Snake; a potential project known as the China Gardens project on the Snake below the mouth of the Salmon at river mile 176; a potential Low Asotin project still farther down on the Snake at river mile 151; and a large potential project on the Salmon River at river mile 3.7 known as the Lower Canyon project.

Either plan would develop the head available between a point (river mile 151) about 10 miles upstream from Lewiston, Idaho, and the Hells Canyon site under license in Project No. 1971 (river mile 248), amounting in all to 730 feet. The principal feature of Plan I is the Nez Perce dam and reservoir, which, being located immediately below the mouth of the Salmon, would store the waters of both the Salmon and the Snake Rivers. Nez Perce would inundate the sites of the proposed Mountain Sheep and Pleasant Valley developments and like the reservoir of the

latter development in Plan II would extend up the Snake to the Hells Canyon site at river mile 248.

The Nez Perce project in Plan I would develop a head of 595 feet, create a reservoir operating at maximum normal pool elevation of 1490 feet and provide usable storage in the amount of 3,900,000 acre-feet. The Lower Canyon project in Plan II would develop a head on the Salmon River in the amount of 542 feet, create a reservoir operating at maximum

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normal pool elevation of 1490 feet and provide usable storage in the amount of 1,560,000 acre-feet. The total storage usable for flood control under Plan I would be 3,900,000 acre-feet and under Plan II would be 2,060,000 acre-feet.

It is readily apparent from the studies presented in House Document 531, in Senate Document No. 51, and from those prepared by the Staff for the Middle Snake Basin that any combination of projects which includes Nez Perce is consistently superior to any combination of projects which does not include Nez Perce. Nez Perce, together with existing storage and that under construction in the Snake Basin above the mouth of the Salmon, would supply all the storage needed to control the flows of the Salmon and the Middle Snake River above the Nez Perce site for the prevention of flood damage downstream on the Columbia, for economic power development and for other beneficial public purposes. The means for passing anadromous fish at the Lower Canyon project in Plan II presents the same problem as that at the Nez Perce project in Plan I.

Plan I is superior to Plan II because the Nez Perce project would provide more storage capacity (almost twice

that of Plan II) at a site where the storage can be utilized to control the flows of the Imnaha, Salmon and Snake Rivers with one dam rather than at separate dams on the Snake and Salmon Rivers, and because Nez Perce would provide better utilization of that storage resulting in almost twice the flood control benefits and substantially greater power benefits at-site and at downstream projects at a cost which is substantially less than the value of the benefits. It is also noted that from an engineering and economic standpoint, the Corps of Engineers consider that the Nez Perce project is undoubtedly the most attractive development in the Middle Snake Basin (H.D. 531, p. 219; S. Dos. 51, p. 113). In addition, it is apparent from the record that the Nez Perce development would be economically feasible for private financing and construction as well as for federal financing and construction.

Turning now to a discussion of the flood control problem, we note that in its Main Control Plan (H.D. 531) the Corps of Engineers recommends a number of projects on the Columbia River and its tributaries with the object of limiting the flow on the Columbia to 800,000 cfs at The Dalles where it had risen to 1,240,000 cfs in 1894 and to 1,010,000 cfs in 1948 when it caused damage of $78,800,000 along the lower Columbia River. The report states that to limit the flow to 800,000 cfs at The Dalles would require only 14,300,000 acre-feet if it could be located at that point, but would require a total of something like 20,000,000 to 21,000,000 acre-feet farther up on the Columbia River or its tributaries at the sites of possible projects. As pointed out below, a part of this required storage will be supplied by construction of reservoirs originally recommended as part of the Main Control Plan and the remainder must be supplied by other combinations of projects. Although the Main Control Plan contemplated

usable storage of 2,300,000 acre-feet on the Snake in the Hells Canyon reach and did not recommend the Nez Perce project or any project on the Salmon River, it is clear from the testimony of the witness furnished by the Corps of Engineers that at least the storage capacity at Nez Perce, assumed by the Corps to be 3,650,000 acre-feet, plus 1,000,000 acre-feet at Brownlee, will be needed to control the Snake and Salmon Rivers.

Of the total amount of storage needed under the Main Control Plan only 5,190,000 acre-feet is presently available; this being at the Hungry Horse project on the Flathead River, Grand Coulee project on the Columbia, Palisades project on the upper reaches of the Snake and, in small amount, from the projects on the Payette and Boise Rivers, which are tributaries of the Snake.

There is a present outlook for an additional 4,700,000 acre-feet from projects proposed in the Main Control Plan. Part of this amount will be obtained at Priest Rapids and John Day on the Columbia, and at the Brownlee development in the Hells Canyon reach. The remaining storage capacity is at Grand Coulee, but may not be utilized for flood control until low level outlets are installed for that purpose.[3]

The other remaining storage possibilities recommended in the Main Control Plan in H.D. 531 include Glacier view

[3] The Main Control Plan contemplated storage capacity of 2,300,000 acre-feet in the Hells Canyon reach of the Snake River whereas the project authorized by our license will provide 1,000,000 acre-feet of storage capacity. The Priest Rapids project as licensed pursuant to Public Law 544, 83d Congress, 2d session (68 Stat. 573) and the Federal Power Act will provide 500,000 acre-feet rather than 2,100,000 acre-feet as contemplated by the Control Plan. Furthermore, it has been recommended that storage at the proposed federal John Day project be reduced from 1,400,000 acre-feet to 500,000 acre-feet because of objections made to flooding the area required to provide the 1,400,000 acre-feet.

and Libby. However, the potential Glacier View project on the Flathead River is objected to by recreation and wildlife interests because it would flood part of a national park, and the potential Libby project on the Kootenai River has been delayed because it is located partly in Canada. In their June 1955 Report (S.D. No. 51) the Corps of Engineers recommended to Congress that the Bruces Eddy and Penny Cliffs projects on the Clearwater River be authorized as part of the Main Control Plan so as to provide 3,733,000 acre-feet of usable flood control storage.

The Nez Perce project which the record in this proceeding shows would make available 3,900,000 acre-feet of flood storage, would fulfill the additional storage need on the Salmon River and on the Snake River above the site. Its capacity would be at a point where it would be effective and yet located in a remote, undeveloped area where no serious

problems would be caused relating to the creation of its reservoir. Furthermore, the dam would be particularly effective because it would control flood waters coming from either the Salmon or the Snake, which might or might not coincide, so that a very efficient use of storage capacity would be achieved. As also pointed out by the report of the District Engineer included in S.D. No. 51, the Nez Perce project, in conjunction with the Brownlee dam licensed by us, or equivalent upstream storage, would provide complete control of both the Salmon and Snake Rivers for all known floods, and in conjunction with projects studied on the Clearwater River would provide full control of the lower Snake River with corresponding proportional control of Columbia River floods below the Dalles. (p. 112) The reason the Corps of Engineers did not

recommend the Nez Perce project was because it was deemed a threat to the downward passage of salmon fingerlings from spawning areas on the Salmon and Imnaha Rivers (p. 33), a matter which will be discussed below.

On the other hand, it seems clear to us that the Mountain Sheep-Pleasant Valley project with its storage of 500,000 acre-feet would provide much less than the possible usable storage on the middle reach of the Snake. Furthermore Plan II, which includes the Lower Canyon project with its 1,560,000 acre-feet of storage, would likewise not realize the storage possibilities and needs on the river, and would be subject to the same disadvantages with respect to the fish runs as Nez Perce without the advantages of the latter project. Therefore, with respect to flood control, so important to downstream communities and agricultural and industrial development, the Mountain Sheep-Pleasant Valley project and the Lower Canyon project are not nearly as well adapted for the purpose of developing the rivers as the Nez Perce project.

The presiding examiner was of the opinion that any lack of storage because of the Mountain Sheep-Pleasant Valley project could be made up elsewhere on the Snake River and its tributaries above the Nez Perce reservoir. Some of this would be in the Salmon Basin where storage projects would be as great a hindrance to the movement of fish as Nez Perce itself and would have the further disadvantage of flooding fish spawning areas which would not be affected by Nez Perce. Furthermore, all of these Salmon Basin sites have not been shown to be economically feasible, and the more recent report of the Corps of Engineers, S.D. No. 51, lists only five sites on the Salmon which may warrant consideration for flood control. As for the other undeveloped sites on the Snake, their economical and engineering feasibility has not been shown, and their justification would depend in part on irrigation. In any

event, the additional flood control storage needed in the Snake Basin above the mouth of the Clearwater River for control of the lower Columbia can be better provided by the Nez Perce project than by the other possible projects considered by the presiding examiner.

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On considering the power benefits, we find that the power output attributable to the Nez Perce project (at-site and downstream) would be over two-thirds more than the power output attributable to the Mountain Sheep-Pleasant Valley project. With the initial power installation the estimated average dependable capacity of the Mountain Sheep-Pleasant Valley project at-site is 1,002,000 kilowatts and its estimated annual usable energy output at the site is 5.31 billion kilowatt-hours, compared with 1,672,000 kilowatts and 7.82 billion kilowatt-hours initially for a possible Nez Perce project. In addition to the at-site generation Nez Perce, because of its greater water storage capacity, would confer substantially greater benefits with respect to the generation of power at downstream projects than would the Mountain Sheep-Pleasant Valley project. This difference in power output arises in part from the fact that the Nez Perce project would develop a slightly higher head but the difference arises to a greater extent from the larger storage in Nez Perce and its utilization of the flows of the Salmon and Imnaha Rivers in addition to the flow of the Snake.

While the output of the Mountain Sheep-Pleasant Valley project could be used immediately by the affiliated companies its does not appear that our failure to grant a license for this project need affect adversely the power situation in the northwest area. The record indicates that there are enough hydroelectric projects under active consideration which when taken with those existing, under

construction and scheduled, could make available power to supply electric loads until the Applicant or its four affiliates could develop other sources of supply.

The Corps of Engineers' Main Control Plan is also concerned with benefits to navigation. The Control Plan contemplates slack water navigation up to Lewiston, Idaho, and thirty miles farther upstream upon an improvement made in the channel. While the Mountain Sheep-Pleasant Valley developments, themselves, would provide no navigation benefits, both Plan I and Plan II would provide substantially the same navigation benefits by the release of water from the various dams to maintain stream flow.

Applicant's project and Nez Perce as well as other possible projects would provide recreational benefits through the pools created in areas suitable for outdoor activities although these benefits were not evaluated in monetary form in the record.

A matter of considerable controversy in this proceeding has been the relation of a possible Nez Perce project to the fish runs on the Columbia River. This river, as is noted above, is one of the great producers of salmon and steelhead trout which are known as anadromous fish because of their life cycle in which they hatch from eggs in the fresh water of the various rivers, pass downstream as fingerlings to the sea where they attain their growth, and return as adults upstream to fresh water where they lay their eggs and most species die. The andromous fish of the Snake River include predominantly spring and fall chinook salmon and steelhead trout although a small number of blueback or sockeye are found.

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About 25% of the entire Columbia River salmon and steelhead production occurs in the Snake River Basin

above the Nez Perce site. It has been estimated that the annual value of the fish production above the Nez Perce site is $5,250,000, of which $1,050,000 is attributable to the production upstream from the Mountain Sheep dam site. The remainder in the amount of $4,200,000 is attributable to fish production in the Salmon and Imnaha Rivers, but principally the Salmon River. It was also stated in the record that the Salmon River sport fishing in Idaho has an annual value of approximately $1,500,000. Both of these estimates represent the gross value of fish. The $5,250,000 estimate represents commercial value of the fish and should be reduced by an amount equal to the cost of taking, processing and marketing the fish. The estimate of the value of sport fishing does not represent net value since the estimate is made up of the total of the gross expenses incurred by sports fishermen in taking the fish and does not necessarily bear any relationship to the market value of the fish. Furthermore, the reservoirs would create sport fishing and other recreational values.

For the upstream passage of fish over high dams there are several methods that may be utilized that are reasonably successful, such as ladders, lifts and locks. Although no method for downstream passage with comparable success has been proven, recently the fishery experts have made great strides in the development of methods and facilities for such passage as a result of studies and research carried out under Federal Power Commission licenses in connection with the Mayfield project on the Cowlitz River (Project No. 2016, 10 F.P.C. 424), the Pelton project on the Deschutes River (Project No. 2030, 10 F.P.C. 445), the Baker project on the Baker River (Project No. 2150, 15 F.P.C. 1496), and the Brownlee development on the Snake River referred to above. Regardless of the method utilized for passage of downstream migrants at high dams, it is apparent that the need for such facilities would be as great

at the Lower Canyon project in Plan II as would be the need for such facilities at Nez Perce in Plan I.

The most promising method is to provide that the intakes to the generating units be located far below the surface of the water so that downstream migrants will not be drawn into the turbines. At the same time one or more devices, known as "skimmers," would be constructed to operate at or near the surface of the pool. This device would draw in water so as to produce a current which would attract the fingerlings. Most of the water would be drained off to be returned to the pool while the fingerlings through flumes or other means would be deposited in the tail race of the dam or otherwise collected for proper disposition in downstream areas. This system has been recently installed at Portland General Electric Company's Pelton project on the Deschutes River in Oregon. The Secretary of the Interior recommends the installation of the skimmer device at the Brownlee dam on the Snake River.

In spite of this promising outlook it is urged that the fish problem at Nez Perce may never be solved successfully. In connection with the Mayfield project we decided that a fair and reasonable balance of interests could be struck, *City of Tacoma*, 10 F.P.C. 424, 431. There was testimony in the present case that the skimmer proposed for Mayfield should function reasonably well for the protection of downstream migrants and installation was justified on the basis of present knowledge and in view of the fact that Mayfield was under construction. The record shows that the biological problem at Nez Perce is generally similar to that at other high dams, but that the engineering problem increases with the drawdown of the reservoirs. We are of the view that this engineering problem is no

greater than many others that must be solved in connection with any project of the size of Nez Perce.

The Hells Canyon Association and the Public Power Association have advocated federal development of the Nez Perce project, while the presiding examiner concluded against the development of the middle reach of the Snake River by the United States itself. The two associations excepted to his conclusion, and the State of Oregon excepted to the reasons given by him in support of his conclusion and requests that the matter be left for determination after additional studies now underway are completed.

There is nothing in this record which convinces us that the Nez Perce project could not be constructed under a license issued pursuant to the provisions of the Federal Power Act. However, since we are not issuing a license for the proposed project and are not requiring the Applicant to amend its plans to include the Nez Perce project, we do not reach the issue usually presented by Section 7 (b).[4]

Pacific Northwest has excepted to the presiding examiner's denial of its motion to dismiss the interventions of the Hells Canyon Association and the Public Power Association contending that neither of these organizations had standing to intervene. The presiding examiner granted Pacific Northwest's similar motion with respect to the Montana Farmers Union, Oregon Farmers Union, National Farmers Union and Idaho Federation of Labor

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[4] Section 7 (b) of the Federal Power Act provides:

Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the Unitd States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development. [41 Stat. 1067, 49 Stat. 842; 16 U.S.C. 800]

saying that the interest of these farm and labor organizations were not such as to fall within the scope of Section 308 (a) of the Act and Section 1.8 (b) of our Rules so as to permit them to intervene. By our orders issued March 12, 1956, and June 22, 1956, we permitted all of the above organizations to intervene in this proceeding. The issue before us now is whether upon the record the organizations have shown that they had standing to intervene and a right to be heard. We conclude that each organization has made such a showing and there is no reason to dismiss their interventions granted by our previous orders. Cf. *United States* v. *F.P.C.*, 345 U.S. 153, 156.

In their exceptions Hells Canyon Association and Public Power Association request that decision be deferred until the completion by the Corps of Engineers of a re-study of the Main Control Plan for the Columbia River and by the Oregon Water Resources Board of a study of the Middle Snake River. The State of Oregon has filed a motion stating there is now pending before its Water Resources Board newly formed under a 1955 statute, an application by Pacific Northwest to construct the Mountain Sheep-Pleasant Valley project, that this Board has entered into a study of the Middle Snake, and that the State would like to have opportunity to present to the Commission its affirmative position when formulated, and asking, therefore, that final decision be delayed until this may be accomplished. In view of the fact that we are denying the application for the license there is no reason for us to delay our decision.

Furthermore, in view of the denial of the application it will not be necessary to consider other issues raised before the presiding examiner.

The Commission finds:

(1) The Mountain Sheep-Pleasant Valley project proposed by Pacific Northwest on the Middle Snake River in Idaho and Oregon would occupy lands of the United States and would be located in and along a section of the Snake River which has been found to be a navigable water of the United States.

(2) The Mountain Sheep-Pleasant Valley project is not best adapted to a comprehensive plan for improving or developing a waterway for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes.

(3) Hells Canyon Association, Public Power Association, Montana Farmers Union, Oregon Farmers Union, National Farmers Union and Idaho Federation of Labor are persons whose participation in the proceeding is in the public interest.

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The Commission orders:

(A) The application for a license for the Mountain Sheep-Pleasant Valley project (Project No. 2173) by Pacific Northwest is hereby denied.

(B) The motions filed by Pacific Northwest that the petitions to intervene filed by Hells Canyon Association, Public Power Association, Montana Farmers Union, Oregon Farmers Union, National Farmers Union and Idaho Federation of Labor be dismissed are hereby denied.

(C) The request by the Hells Canyon Association and the Public Power Association and the motions by the State

of Oregon that our decision herein be delayed is hereby denied.

By the Commission. Commissioner Kline dissenting.

(SEAL)

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

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BEFORE THE
FEDERAL POWER COMMISSION

Project No. 2173

In the Matter of

PACIFIC NORTHWEST POWER COMPANY

Application for Rehearing

ALLAN A. SMITH
HUGH SMITH
Smith, Gray, Hill & Rodgers
1504 Public Service Building
Portland 4, Oregon

Counsel for
Pacific Northwest Power Company

Dated: February 18, 1958

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BEFORE THE
FEDERAL POWER COMMISSION

Project No. 2173

In the Matter of

PACIFIC NORTHWEST POWER COMPANY

Application for Rehearing

Comes now Pacific Northwest Power Company, applicant for license in the above entitled proceeding ("Applicant"), and petitions the Commission for a rehearing of the cause herein, for a modification of the Commission's order, and for a stay thereof, on the grounds that Applicant has been aggrieved by errors of the Commission in its order issued January 20, 1958, in the following respects:

INTRODUCTION

One basic error permeates the Opinion of the Commission, the failure to rule upon the prime issue involved in proper comprehensive development of the Middle Snake River. This issue was stated by the Applicant in opening its oral argument:

> "• • • whether a plan of development that risks the destruction of an important resource can be considered to be 'best adapted to a comprehensive plan' in comparison to an alternative plan, with substantially the same potential for development of the other resources of the river but which does not risk the destruction of one major resource."

Every competent authority that has studied the middle reach of

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the Snake River has concluded that development on and below the Salmon River cannot go forward until and unless preservation of the fishery resource can be assumed—that the importance of that resource outweighs any possible flood control or power that might be developed. This was fundamental in the judgment of the Corps of Engineers when, in House Document 531, they determined not to recommend Nez Perce for construction, and was again the major factor when the Corps and the Bureau of Reclamation, in Senate Document 51, recommended immediate construction of Mountain Sheep and Pleasant Valley. This was the basis upon which the Applicant applied for a license for Mountain Sheep-Pleasant Valley, was the basis upon which the presentation of material was made by the Applicant, by the intervenors, and by the staff of the Federal Power Commission, and was the assumption upon which this case was argued to the Examiner and to the full Commission. This threshold question, not being answered by the Commission, leaves its opinion fatally incomplete.

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Assignment of Error No. 7

The Commission erred in establishing an alternate development to Applicant's project as a proper standard under Section 10(a) of the Federal Power Act in absence of a determination that such alternate project was feasible of construction within the time during which the comparison with Applicant's project made by the Commission remained valid.

(a) The purpose of the Federal Power Act is to encourage present development of the water resources of the United States (Senate Report 180, 66th Congress, 1st

Session) and not to delay development because of some hypothetically superior plan. (Re *Virginia Electric & Power Co.*, 10 F.P.C. 1) The use of an alternative project as a standard where the alternative would clearly never be constructed by the Applicant or anyone else defeats the purpose of the Federal Power Act, and vitiates the practical provisions of Section 10(a) thereof.

(b) The Commission ered in failing to make and appropriate order with respect to Nez Perce. In its order the Commission makes no provision for continuance of this matter with respect to the construction of Nez Perce, contrary to the provisions of Section 5 and Section 10(a). Consequently, the Commission is free, in a separate license proceeding on Nez Perce, to reach the conclusion that Nez Perce in turn does not meet the statutory standard. It is the Commission's statutory duty under Section 10(a) to provide in this proceeding, or an appropriate continuation thereof, and to the extent of the Commission's powers, for the comprehensive development of the resources involved.

(c) The Commission failed to act in acordance with Sections 5 and 10(a) of the Federal Power Act in that it failed to protect Applicant

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in its priority right to undertake a project best adopted to a comprehensive plan, and failed to accord Applicant opportunity to take such steps, in view of the Commission's opinion, as are indicated necessary for such purpose. As already noted above, at least one alternative, a High Mountain Sheep dam at a site between the Salmon and Imnaha, was not included in the Commission's consideration, and opportunity must therefore be accorded to determine the place of that project within a comprehensive plan that meets standards of the Commission.

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Because of the fundamental principle involved we would like, in closing, to emphasize the serious consequences of letting the Commission's order stand.

We have already commented on the error of the Commission in failing to require or obtain probative and substantial evidence that Nez Perce is feasible both from an engineering and a financial point of view before it denied the application of Pacific Northwest Power Company for a license for the Mountain Sheep-Pleasant Valley Project.

While the Commission states on page 6 of its order "It is apparent from the record that the Nez Perce development would be economically feasible for private financing and construction as well as for federal financing and construction" there is no substantial evidence in the record to support that statement.

Furthermore, on page 11 of the order the Commission says: "There is nothing in this record which convinces us that the Nez Perce project could not be constructed under a license issued pursuant to the provisions of the Federal Power Act." The absence of anything in the record to show an alternative dam cannot be constructed falls far short of justifying the Commission in denying a license for Applicant's project, of which the Commission says: "It is clear from the record that the proposed project would have engineering and economic feasibility * * *." (Commission Order p. 4)

These are not technical or fly-specking objections. They go to the very root of the purposes of the Federal Power Act. There is nothing fair,

just or reasonable about denying a license applied for after thorough, painstaking and enormously expensive investigations under the terms of a preliminary permit issued

by this Commission merely because the Commission feels that some other project would be preferable when there is no proof that the other project is feasible. In this case the expenditures to date exced $2,500,000. All that goes down the drain because "there is nothing in this record which convinces us that the Nez Perce project could not be constructed under a license issued pursuant to the provisions of the Federal Power Act."

Unless and until this Commission satisfies itself from substantial and reliable evidence that Nez Perce is feasible, that is that foundation conditions are suitable and adequate, that a given type of dam is feasible and that the cost is not prohibitive, there is no basis on which a decision can be reached that "any combination of projects which includes Nez Perce is consistently superior to any combination of projects which does not include Nez Perce." (Commission's Order, p. 6) Yet the sole ground for the denial of the application for license is that Nez Perce is best adapted to a comprehensive plan.

It is entirely possible that if this petition is denied it may develop that Nez Perce is not feasible and that Applicant's projects are best adapted to a comprehensive plan.

This might result from opposition of fishing interests or from a thorough and detailed study of the site and the costs.

For example, it is a well known fact that the estimates of cost in 308 reports are at best preliminary and are frequently grossly inadequate. The record shows that no detailed investigation has been made of foundation

conditions. These examples could be multiplied.

Nevertheless if the Commission's order stands and it later develops that Nez Perce is not feasible or is not best adapted to a comprehensive plan and that Applicant's

project is best adapted to such a plan, Applicant will have lost all of its rights.

This is not the purpose or intent of the Act. Indeed, it is the direct antithesis of that purpose and intent.

Nor is it the duty or obligation of an Applicant to engineer every possible alternative or to demonstrate its financial feasibility of infeasibility. Such a requirement would negate the licensing provisions of the Act at least in so far as any major project is concerned.

The unfairness and inequity is not limited to the effect upon this application or upon this Applicant. This order, if sustained, will create a precedent, a precedent which says "if there is any other project which if it should appear to be feasible would be better adapted to a comprehensive plan a license application will be denied even if there is no substantial evidence of the feasibility of an alternate project."

With such a precedent the intervenors National Hells Canyon Association et al. will have accomplished their purpose. They will have effectively prevented the construction of any major project by anyone except the Federal government.

If this Commission is to carry out its trust under the Act the least it can do is to grant the petition for rehearing and proceed in

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such appropriate manner as it may designate to obtain the necessary proof as to the feasibility or infeasibility of Nez Perce.

WHEREFORE, for the above reasons, wherein Applicant has been aggrieved by the order of the Commission, Applicant requests the Commission:

1. To so modify its order as to issue a license to Applicant for the Mountain Sheep-Pleasant Valley project as being best adapted to a comprehensive plan of devlopment, or, in the alternative,

2. To set this matter down for rehearing upon the matters and considerations set forth herein, the date for such rehearing to be determined in view of the requirement for examination and reexamination of the matters herein for the full and complete information of the Commission, or in the alternative,

3. To so modify its order as to provide to the Applicant time and opportunity to determine such modification of Applicant's project and structures proposed therein and the location of such structures as will accord to the determination of the Commission as to the best comprehensive development of the resources involved, adequate time being permitted the Applicant for such field examination as may be required to develop further information not adequately provided in the present record, and

4. To stay the order of the Commission for such period of time as may be reasonable and necessary for the Applicant to take such further steps as outlined above, and

5. For such further relief as is appropriate and necessary

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in the premises.

Respectfully submitted,

PACIFIC NORTHWEST POWER COMPANY

By THOS. W. SCHELL
Vice President

Attest:

CLARENCE O. PHILLIPS
Assistant Secretary

(Corporate Seal)

SMITH, GRAY, HILL & RODGERS
Smith, Gray, Hill & Rogers
Attorneys for Applicant

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[Docketed March 20, 1958]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

Project No. 2173

In the Matter of

PACIFIC NORTHWEST POWER COMPANY

Order Denying Application for Rehearing and Stay

(Issued March 20, 1958)

On February 18, 1958 Pacific Northwest Power Company (Applicant), filed an application for rehearing of the Commission's opinion No. 307 and order issued January 20, 1958 denying Applicant's application for license to construct, operate and maintain a proposed hydroelectric project, which would consist of its proposed Mountain Sheep and Pleasant Valley developments, on the Snake River between Idaho and Oregon. The Mountain Sheep dam would be located immediately upstream from the mouth of the Imnaha River and the Pleasant Valley dam would be located in the upper limtis of the Mountain Sheep pool and would back wafer up to the Hells Canyon site.

The Commission orders:

The application for rehearing and stay of the Commission's opinion and order issued January 20, 1958 is hereby denied. An opinion and order will be issued later.

By the Commission. Commissioner Kline dissenting.

J. H. GUTRIDE
J. H. Gutride,
Secretary.

(Seal)

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[Docketed April 11, 1958]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 311

Project No. 2173

In the Matter of

PACIFIC NORTHWEST POWER COMPANY

Opinion and Order on Rehearing

Issued: April 11, 1958

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[Docketed April 11, 1958]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

Project No. 2173

In the Matter of

PACIFIC NORTHWEST POWER COMPANY

OPINION No. 311

Opinion and Order on Rehearing

(Issued April 11, 1958)

By order issued March 20, 1958 in this proceeding we denied the application filed February 18, 1958 by Pacific Northwest Power Company (Applicant) for rehearing of the Commission's opinion No. 307 and order issued January 20, 1958 denying Applicant's application for license

to construct, operate and maintain a proposed hydroelectric project on the Snake River between Idaho and Oregon which would consist of Applicant's proposed Mountain Sheep and Pleasant Valley developments. The Mountain Sheep dam would be located immediately upstream from the mouth of the Imnaha River and the Pleasant Valley dam would be located in the upper limits of the Mountain Sheep pool and would back water up to the Hells Canyon site.

Our order of March 20, 1958 also denied Applicant's request that we "stay the order of the Commission for such period of time as may be reasonable and necessary for the Applicant to take such further steps as outlined" in its application for rehearing; and our order further stated that an opinion and order would be issued later.

In its application for rehearing Application requested, among other things, that the Commission grant a license for its proposed project or in the alternative that the Commission "so modify its order as to provide to the Applicant time and opportunity to determine such modification of Applicant's project and structures proposed therein and the location of such structures as will accord to the determination of the Commission as to the best comprehensive development of the resources involved."

In our order denying application for license we concluded that any combination of projects for the comprehensive development of the Middle Snake River basin which includes Nez Perce project is consistently superior to any combination of projects which does not include Nez Perce. In reaching our conclusion we were aware of storage benefits which would be available from Nez Perce not only during the period used in the economic studies but also during the entire life of the project. The evidence of record

relating to the Nez Perce project amply supports our conclusion that Applicant's proposed Mountain Sheep-Pleasant Valley project (which would be in conflict with Nez Perce) should not be licensed.

Before issuing our order on March 20 denying the application for rehearing and stay we concluded that the application for rehearing failed to disclose any reason justifying any changes in the conclusions set forth in our opinion No. 307 and order denying license and further that the application for rehearing failed to disclose any purpose that would be served by a stay of our order.

The Commission finds:

(1) The assignments of error and grounds for rehearing in the above described application for rehearing set forth no new facts or principles of law which were not fully considered by the Commission when it adopted its above-described opinion and order issued January 20, 1958, or which having been reconsidered warrant any change or modification of said opinion and order.

(2) No adequate showing has been made that the Commission's opinion and order issued January 20, 1958, be stayed and it is appropriate in the administration of the Federal Power Act that the request for a stay be denied.

The Commission orders:

This opinion and the conclusion and findings herein are hereby incorporated and made a part of the Commission's order issued in this proceeding on March 20, 1958 denying application for rehearing and stay.

J. H. GUTRIDE
J. H. Gutride,
Secretary.

(Seal)